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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1441

RICHARD X. CONNORS, ELIZABETH E. CONNORS, DOUGLAS H. RILEY, CAROL E. RILEY, JOSEPH E. RAMEY and ETHEL C. RAMEY,

Petitioners,

v.

CHAS. PFIZER & CO., INC., BRISTOL-MYERS COMPANY, AMERICAN CYANAMID COMPANY, OLIN CORPORATION, and THE UPJOHN COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to Review the Judgment of the United States Court of Appeals for the Second Circuit entered on November 12, 1971. Petition for Rehearing was denied on January 4, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 450 F.2d 1119, and is Appendix E herein. The opinion of the

District Court is reported at 333 F. Supp. 296 and appears as Appendix D herein. The opinions of the other pertinent cases are; *Charles Pfizer & Co., Inc. v. Federal Trade Commission*, 401 F.2d 574 and appears as Appendix A herein; *State of West Virginia v. Charles Pfizer & Co., Inc.*, 314 F. Supp. 710, and appears as Appendix B herein; *State of West Virginia v. Chas. Pfizer & Co., Inc.*, 440 F.2d 1079, and appears as Appendix C herein.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1971, rehearing denied on January 4, 1972. Jurisdiction of this Court is invoked under 54 U.S.C. 1291, 1292.

QUESTIONS PRESENTED FOR REVIEW

I. Does not the overriding public importance of patent antitrust cases, which protects potential competitors and licensees also extend to the protection of consumers by preventing the patentee from using a consent judgment as res judicata to the consumers' claim, without adjudication of patent validity in the prior judgment?

II. Do the considerations stated in *U.S. v. Utah Construction Co.* and in *Blonder-Tongue v. University Foundation* apply to Subsequent litigation involving consumer claims? If so, then does not the Court's refusal to acknowledge the adjudication of patent invalidity by the Federal Trade Commission and affirmed by the Court of Appeals, render void as to the petitioners, the prior judgment used as res judicata against them?

III. Is not the requirement that a class member must file a claim or be forever barred, an unauthorized procedure under Rule 23 of the Federal Rules of Civil Procedure, and is not such a requirement a violation of the due process requirements of the United States Constitution?

IV. Can the class members' silence in response to a class action notice act as a transfer of his rights to the class representative to use for public purposes?

V. Is there not a conflict of interest between the class representative and class members he purports to represent when the class representative owns hospitals on behalf of which he is making a claim and purports to represent consumers who purchased drugs in those hospitals, and the class representative pays his proprietary (hospital) claims full value but requires the consumer to file a claim to collect anything at all?

VI. Is there not a conflict of interest when the class representative contemplates retaining all funds for himself which he collected on behalf of consumer class members?

VII. Can the class representative require differing procedures for claim filing when the necessary benefit of the more difficult procedure accrues to a class in which he has a proprietary interest?

VIII. Does Rule 23 of the Federal Rules of Civil Procedure authorize the formation of classes for settlement purposes only? If so, can a judgment entered in such an action bind nonresponding members to a class notice sent pursuant to the formation of such a class?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"... nor be deprived of ... property, without due process of law; ..."

"... nor shall private property be taken for public use, without just compensation." The full text of Amendment V is set out in Appendix F.

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, is set out in Appendix F, the pertinent language reads; "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... without respect to the amount of controversy ..."

Section 16 of the Clayton Act, 15 U.S.C. Sec. 26, is set out in Appendix F, the pertinent language reads; "Any

person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ."

Sections 1 and 2 of the Sherman Antitrust Act are set out in Appendix F due to their length.

RULES OF PROCEDURE INVOLVED

Rule 23 of the Federal Rules of Civil Procedure is set out in Appendix F due to its length.

STATEMENT OF THE CASE

The Federal Trade Commission commenced action against the Defendants in 1958 by complaint charging patent fraud, price fixing, monopoly, and patent misuse. After exhaustive litigation, the United States Court of Appeals for the Sixth Circuit affirmed the Commission's findings of fact in its opinion captioned *Charles Pfizer & Co., Inc. v. Federal Trade Commission*, 401 F.2d 574 (App. A), Certiorari was denied. 394 U.S. 920.

After ample factual statement, the Sixth Circuit stated as to Pfizer, the patentee:

> "... We further hold that substantial evidence supports the Commission's conclusion that Pfizer made misrepresentations of material facts and withheld pertinent information, thereby obtaining a patent on tetracycline which otherwise never would have been issued." (App. A, pg. 13)

Independently, three of the Defendants herein were indicted by a grand jury for price fixing arising from essentially the same offenses. The Federal Government obtained a favorable jury verdict *United States v. Charles Pfizer & Co., et al.*, 281 F. Supp. 837 (1968), which was reversed by the United States Court of Appeals for the Second Circuit 426 F.2d 323 (1970) due to improper instruction to the jury. The Court of Appeals was affirmed by an equally divided Court here and the case returned to the District Court for a new trial. ___ U.S. ___, 92 S. Ct. 731, 30 L. Ed. 2d 721 (January, 1972).

During the period 1967-1968, nearly all of the States, including the Commonwealth of Virginia, by their Attorneys General, filed civil actions in various Federal District Courts seeking class representation on behalf of public hospitals other public bodies and consumers within the state under Rule 23(b)(3) of the Federal Rules of Civil Procedure and as Parens Patriae on behalf of its citizen consumers. These cases were consolidated for pretrial discovery pursuant to an order of the Judicial Panel on Multidistrict Litigation in 1968. In addition, various other cases were filed on behalf of wholesaler-retailers, competitors, welfare funds, insurance companies and non-human market users.

On February 6, 1969, the Defendants and certain State Plaintiffs brought a settlement agreement before District Court for implementation. To that point, no adjudication had been made as to any allegations, most pertinently, patent fraud or patent misuse.

Following the agreement on May 26, 1969, the District Court created a national class of States for settlement purposes only and permitted each State to opt out by June 10, 1969, on behalf of all public purchasers and individual consumers. By the terms of the order, all accepting States became de jure class representatives for their public bodies and individual consumers. Seven States (North Carolina, California, Kansas, Utah, Hawaii, Oregon and Washington) opted out and are presently litigating their claims in the District of Minnesota before Judge Miles W. Lord.

On June 10, 1969, by the terms of the May 26, 1969, order, the National Class evaporated, leaving before the court forty-three statewise class actions for settlement purposes only.

On July 1, 1969, notice to consumers was published in newspapers throughout the forty-three State area the essential elements of which were the existence of the litigation, the Attorney General's determination to accept a settlement; the requirement that consumers must, by August 15, 1969, file a claim supported by documentation from the pharmacy

or under oath showing the year and total amount of purchases, the name of each product, the pharmacy from which it was purchased and any reimbursement source; written proof of purchases may be required later; the consumer by failure to file a claim authorizes the Attorney General to utilize whatever money he may recover as the consumer representative for the benefit of the citizens of the State as the Court may direct.

The notice to the public hospital members of the class required that the hospital opt out. No claim filing was required.

On February 13, 1970, Petitioners herein filed suit in the Federal District Court for the Eastern District of Virginia on behalf of themselves, a class of "retail prescription purchasers" (consumers) alternatively in Fairfax County, Virginia, the Commonwealth of Virginia, or nationwide, seeking damages and injunctive relief.

On February 24, 1970, notice was published in newspapers notifying consumers of a hearing set for March 24, 1970, in the Southern District of New York to pass on the fairness and adequacy of the Settlement proposal. On March 24, 1970, the undersigned Counsel appeared before the District Court and spoke in opposition to the settlement. The reasons given for the opposition were (1) the inadequacy of the settlement amount, (2) the conflict of interest between the class representative and the consumers, (3) the impropriety of a class action for settlement purposes only, (4) the unconstitutionality of the silent assignment of the consumer's funds to the class representative, (5) unconstitutional discrimination between the consumers and public hospitals, and (6) the impropriety of the notice to consumers in a failure to supply essential information and setting an unreasonable time for response.

The District Court issued its opinion approving the settlement captioned *State of West Virginia v. Charles Pfizer & Co., Inc.*, 314 F. Supp. 710 (1970) (App. B). The opinion explains the litigation, who was involved in the settlement

and concludes that the settlement was fair and reasonable. The judgment entered dismissing the suits were appealed to the Second Circuit Court of Appeals by certain wholesaler-retailers which affirmed the District Court. *State of West Virginia v. Charles Pfizer & Co., et al.*, 440 F.2d 1079 (2nd Cir. 1971) (App. C).

In the District Court opinion there were no findings of fact as to patent fraud and patent misuse except the statement that the Court had reviewed the F.T.C. opinions and record concluding that the Plaintiffs had less than a 50% chance of success. Cf. *Protective Committee, etc. v. Anderson, etc.*, 390 U.S. 414. The Court of Appeals followed suit. Certiorari was denied.

In the meanwhile, the Petitioners case was transferred to the Southern District of New York pursuant to order of the Judicial Panel on Multidistrict Litigation and categorized as one of the non-settling cases before Judge Miles W. Lord D Minn., sitting by designation.

The Defendants interposed as a defense a plea of res judicata to the complaint of the Petitioners arising from the judgment order in the settling case of the *Commonwealth of Virginia v. Charles Pfizer, et al.* The District Court granted the Defendants motion on March 30, 1971, stating that the Petitioners were members of the consumer class and the appearance of the undersigned in the Southern District of New York at the settlement hearing of March 24, 1970, was sufficient to make the Petitioners bound class members. Accordingly, Petitioners should have appealed the settlement judgment. 333 F. Supp. 296 (App. D).

The Court of Appeals for the Second Circuit affirmed that decision per curiam on November 12, 1971, rehearing den'd January 4, 1972. 450 F.2d 1119 (1971) (App. E). Petitioners herein seek a Writ of Certiorari to review that decision. 54 U.S.C. 1291, 1292.

Petitioners were granted an extension of time from April 4, 1972 to May 4, 1972 within which to file their petition for

a Writ of Certiorari (without prejudice to the timeliness of their request).

The jurisdiction of this Court is invoked for the following reasons: (1) this case involves *important questions of the* application of Rule 23 of the Federal Rules of Civil Procedure, (2) the integrity of the Federal Judiciary in giving the appearance of permitting parties before it to "buy a monopoly" in the face of a strong line of cases of this Court forbidding actions which give rise to such appearances, (3) this case is of national significance, affecting the rights of millions of citizens whose alleged class representatives failed in their fiduciary duty to the absent class members, thereby reaping a benefit to themselves in their proprietary capacity.

ARGUMENT

I.

The theory of Petitioners case is that the Defendants obtained the issuance of a patent by fraud and misrepresentation. This invalid patent served as a basis for licensing agreements which divided markets and otherwise shared a monopoly (fixing prices as an adjunct thereto). This course of action is a violation of Sections one and two of the Sherman Act. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174 (1965).

The Petitioners right to sue for damages resulting from the violation arises from Section 4 of the Clayton Act. This right to sue has been most recently recognized in *State of Hawaii v. Standard Oil Co. of California,* U.S. ,92 S. Ct. 885, 891-892, L. Ed. 2d (Dec'd. 3/1/72).

In the case of *Blonder-Tongue v. University Foundation,* 402 U.S. 313, pg. 323, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971), this Court set out the controlling criteria in determining the validity of a plea of res judicata [1] ". . . was the issue decided in the prior adjudication identical with the one presented in the action in question; [2] was there a final judgment on the merits, [3] was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

A negative answer to any one of the three questions cited in *Blonder-Tongue* prevents the utilization of the plea of res judicata in the instant case.

1. The issue decided in the prior adjudication was not identical with the one presented in this action simply because the issue of patent fraud and price fixing were never adjudicated. The issue of patent fraud, although only one of the two elements necessary to spell out a violation of Sections 1 and 2 of the Sherman Act, under the *Walker Process* theory, was also not adjudicated. However, the instant litigation is one step removed from this criteria. Not only has there been no adjudication of the issue of patent fraud in the former suit, but the Sixth Circuit Court of Appeals found that the Defendant had illegally obtained the very same patent through fraud and misrepresentation.

2. There was no final judgment on the merits although a final judgment was entered. None of the merits of the case have been litigated.

3. Petitioners, the parties against whom the plea is asserted were not parties to the Commonwealth of Virginia action or in privity with it due to the panaply of substantive violations of their constitutional rights as more fully explained below.

The Petitioners, in their capacity as consumers, are protected by the same policy considerations afforded other persons affected by patent misuse, invalidity and fraud so exhaustively discussed in *Blonder-Tongue, supra,* pages 346-347, particularly in patent antitrust cases.

II.

In patent fraud antitrust, there is the explicit rule that the question of patent invalidity must be adjudicated before any consent judgment can be successfully pleaded as res judicata. This special rule, while not exclusively limited to patent antitrust cases, is founded upon the proposition that the doctrine of res judicata in patent cases is limited by the public policy against monopoly. *Mercoid Corp. v. Mid-*

Continent Investment Co., 320 U.S. 661, 670, 64 S. Ct. 268, 88 L. Ed. 376, *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 177, *Pope Manufacturing Co. v. Gormully*, 144 U.S. 224, 235. *Katzinger Co. v. Chicago Mfg. Co.*, 329 U.S. 394, 399-400.

III.

Although not a primary issue here, the huge costs of patent fraud litigation together with the other considerations in *Blonder-Tongue* which are present in this litigation, coupled with the prior Sixth Circuit decision in the F.T.C. patent fraud case, present striking parallels to the *Blonder-Tongue* case.

Two different lines of cases converge in this litigation to present a case wherein there could have been a different result if either of them had been applied to the case. First the Factual Findings and determination of the Federal Trade Commission, as affirmed by the Court of Appeals for the Sixth Circuit should have estopped the Defendants from attempting to relitigate the patent validity issue and prevented the District Court from casting doubt upon the value of the decision in its settlement opinion. *United States v. Utah Construction Co.*, 394 U.S. 394 (1966). The District Court, in the settling opinion never mentioned this doctrine. The estoppel doctrine has been recently extended to apply to third parties in patent litigation where the patentee and other private parties have litigated the issue of patent validity in another case. *Blonder-Tongue, supra.*

Second, the consent judgment which left unlitigated or unadjudicated the patent validity issue cannot be used as a basis for a plea of res judicata in patent antitrust litigation.

IV.

CLASS ACTION IRREGULARITIES

In determining the res judicata effect of any class action judgment entered pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court must look at the substance and not the form. *Chicago B & Q R. Co. v. Chicago,* 166 U.S. 226, 234. 41 L. Ed. 979, 984 (1896).

The leading case in determining questions of constitutional due process in class actions is *Hansberry v. Lee,* 311 U.S. 32 (1940).

The requirements for adequate notice to absent members of a class are set out in *Mullane v. Central Hanover Trust Company,* 339 U.S. 306 (1950).

V.

THE SILENT ASSIGNMENT OF THE CONSUMERS' CLAIMS TO THE ATTORNEY GENERAL FOR THE PUBLIC USE

Notice dated July 1, 1969, was published in various newspapers in Virginia, and provided in part, that if a citizen did not file a claim, exclude himself, or intervene by Counsel, it would be assumed that the State would use any funds collected on his behalf for public purposes.

The citizen's right of action allegedly transferred by the citizen's silence is an assignable right of action for treble damages given to him by Section 4 of the Clayton Act arising from damages sustained as a result of violations of the Sherman Antitrust Act. *Hawaii v. Standard Oil of California, supra, Sampliner v. Motion Picture Patents Co.,* 254 U.S. 233 (1920), *Kunihiro v. Lyons Brothers Co.,* 12 F.2d 894 (9th Cir. 1926), *Barnes Coal Corp. v. Retail Coal Merchants Assn.,* 128 F.2d 645 (4th Cir. 1942). Such a right of action has long been recognized as a vested property right. *Cooley, Constitutional Limitations,* 8th Edition (1927), p. 756; *Lynch, et al. v. Household Finance Corp., et al.,* ___ U.S. ___ Page ___ S.Ct. ___, Slip Op. pg. 14 (Dec'd. 3/27/72).

Under the terms of the settlement proposal, appellants, as consumers who neither opted out, opted in, or intervened by

Counsel, will not be compensated for their property rights transferred to the State of Virginia.*

The Fifth Amendment to the U.S. Constitution flatly prohibits such a result in the following language: "nor shall private property be taken for public use, without just compensation."

The leading case wherein the Court exhaustively reviewed the application of this prohibition and the inherent prohibition embodied in the due process clause of both the Fifth and Fourteenth Amendments is *Chicago B. & Q. R. Co. v. Chicago, supra.* The prohibition is broad in application to all species of property and all types of takings.

The Court quoted the language of Justice Jackson (pp. 238, 239):

> "Whatever may have been the power of the states on this subject prior to the adoption of the 14th Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provisions or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said Amendment."

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*A reading of the settlement opinion gives the impression that most states will advertise for consumer claims during the so-called second stage allocation. From papers filed it appears only the state of Ohio plans to advertise. (App. 47)

The taking of the appellants' right of action under the guise of an extension of the Parens Patriae doctrine similarly runs afoul of the due process provisions of the Constitution. See also *Hawaii v. Standard Oil, supra.*

The Circuit Court of Appeals, in its opinion dealing with the appeal of certain wholesaler-retailer objections, (opinion approving the settlement), volunteered an opinion of approval of the silent assignment founded on the analogy of the "Book of the Month Club" procedure (sometimes called the negative option plan).

The subscriber to the Book of the Month Club, and similar organizations, executes a contract agreeing to this procedure. The subscriber is also the recipient of something of value and is required to pay because he received it and kept it.

VI.

THE REQUIREMENT THAT A CONSUMER FILE A CLAIM OR BE FOREVER BARRED

Due process in matters pertaining to notice given by publication under a statutory or other procedural scheme requires a "strict and literal compliance with statutory provisions." *Galpin v. Page,* 18 Wall. 350, 369, 21 L. Ed. 963-964 (1856).

The same standard applies to the Federal Rules of Civil Procedure.

Rule 23 governs the conduct of class actions and the rights of absent parties.

Rule 23(c)(2) provides for notice to the class by the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

The notice provisions regarding members of the class and their rights are specific. He must be advised that (a) the Court will exclude him from the class if he so requests by a specified date. (b) If he doesn't exclude himself, he will be

included in the class judgment, whether favorable or unfavorable or he may enter an appearance through his Counsel.

The requirements of notice at the class determination stage are for purposes of permitting the member, now a de facto party in absentia, to exclude himself or make an appearance through Counsel or his participation becomes that of a de jure member of the class and a party to the suit as though he were there in person before the Court.

The duty of the class representative has historically been to stand in judgment for all members of the class. This includes not only an adjudication of the defendants' liability to the class of plaintiffs, but also determination of damages and collection of the same. *Storey Eq. Pl., supra*, § 97-135.

The procedure employed in the settlement cases failed to comply strictly with the provisions of Rule 23 and is wanting in due process afforded to the appellants because nowhere in the Rule is there the requirement that the appellants must file a claim or lose it.

VII.

THE CONFLICTS OF INTEREST BETWEEN THE CLASS REPRESENTATIVE AND THE MEMBERS OF THE CLASS

The Court in *Hansberry v. Lee, supra*, stated the rule:

> "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far." (citing cases) ". . . Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants. *Tumey v. Ohio, 273 U.S. 510.*"

Two areas of direct conflict exist in the settling case classes. First, the State in its class representation of citizens as consumers and hospitals necessarily represented divergent interests since the hospitals served as a mere conduit to the citizens who consume the products of the defendants in these institutions, and who bear the brunt of the overcharges exacted by the defendants and passed on to the patient. Second, the State, by being the transferee of the citizens right of redress through the assignment by silence, reaped the benefits of an ineffective notice in that it was able to retain for itself all unclaimed funds allegedly allocated to consumers.

It is hard to believe that the notice was other than ineffective when one considers that in 43 States only 42 consumers filed notices of exclusion while in the non-settling State of North Carolina alone, pursuant to mailed notice, over 10,000 people requested exclusion.

Only 38,000 consumers filed claims out of 60,000,000 potential claimants (estimated number of householders in 43 states).

VIII.

THE PROCEDURE SET FORTH IN THE NOTICES TO CONSUMERS AND PUBLIC BODIES DIFFERED SO GREATLY AS TO RESULT IN A DISCRIMINATION AGAINST THE RIGHTS OF THE CONSUMER.

Pursuant to Court Order, notices sent to all public entities on or before June 26, 1969, within the institutional class of so-called C.C.S. entities, represented by the State, "described the situation generally and included a copy of the settlement plan. The class members were given until August 1, 1969 to exclude themselves from the class." 314 F. Supp. 710, 724. There was no requirement that the hospital file a claim in any form whatsoever.

However, the notice to consumer class members published July 1, 1969, required

(1) Exclusion by August 1, 1969 or,

(2) Filing by August 16, 1969.

The consumer class was treated wholly different from the institutional class. The result was a direct economic benefit to the State and to the institutional class. More importantly, the result was a total denial of redress for the consumers rights and set the stage for an unfair allocation of funds between the classes. (App. 46)

It has been said that those who make the law "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough." *Locke on Civil Government*, Section 142, *Strauder v. W. Virginia*, 100 U.S. 303, 25 L.Ed. 664, *Cooley, Constitutional Limitations*, 8th Ed. (1927) Vol. 2, pg. 809.

The guaranty of "equal protection of the laws is aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It requires that all persons subject to legislative, executive or judicial acts shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed." *Cooley, Constitutional Limitations*, supra, pp. 809-817, 824-845 (and cases cited therein).

The State represented all of the institutional class members in accordance with the procedure of Rule 23 but applied a different rule to the consumers, i.e., requiring them to file a claim to be represented in the class. This discrimination should not be confused with the act of taking of the consumers claim which is a separate violation but of necessity required the claim filing procedure as a necessary predicate to transfer by silent assignment.

IX.

A CLASS, SPECIFICALLY DESIGNATED AS A CLASS FOR SETTLEMENT PURPOSES ONLY, CANNOT BIND NON-ASSENTING CITIZENS SINCE THE PROCEDURE DEVISED IS NOT WITHIN THE AMBIT OF RULE 23 F.R.C.P.

Rule 23 should be liberally construed in order to be an effective instrument in the administration of justice. Liberal construction however, must be within the bounds of the language of the rule. There is no place in Rule 23 one can logically point to in order to support the proposition that a class can be formed for settlement purposes only and thereby bind all members of the putative class.

In order to reach the conclusion that all consumers are bound by the Order of judgment entered in the settling cases, one must presume without any factual basis, that all consumers wished to settle or that only those persons who filed claims wished to settle.

In either case, no language in Rule 23 permits a class for settlement purposes only. But under the interpretation that only filing claimants are bound, no violence is done to the constitutional rights of the silent consumers. It is only when such a class design is used in an attempt to bind silent, non-assenting consumers does the question of unconstitutional excess raise its ugly head.

Previously herein there have been cited various authorities on constitutional limitation including *Hansberry v. Lee*, Storey's works, *Chicago B. & Q. R. Co. v. Chicago* and *Galpin v. Page*.

X.

THE NOTICE TO CONSUMERS DATED JULY 1, 1969 FAILED TO MEET THE DUE PROCESS REQUIREMENTS OF THE U.S. CONSTITUTION BECAUSE IT FAILED TO SUPPLY ESSENTIAL INFORMATION AND REQUIRED AN UNREASONABLE PROCEDURE BOTH AS TO INFORMATION NECESSARY AND TIME FOR RESPONSE.

The requirements as to adequate notice go beyond the simple question of whether notice is mailed or published. *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 94 L. Ed. 865 (1950).

Substantively, the defects of the notice were largely created prior to its publication by the design of the plaintiffs and defendants February 6, 1969 agreement and have been set out herein. Publication one time, in a newspaper, may not be adequate procedurally under *Mullane*. However, this issue involves a discussion of the costs of class action litigation and the efficacy of a Rule 23(b)(3) class in a situation where a Rule 23(b)(2) class is much more advantageous to judicial administration and the litigants. Petitioners contend that notice here was procedurally inadequate if notice was actually required because a Rule 23(b)(3) class was the only type available for consumer representation. It is connected to the Question Presented for Review concerning the efficacy of a 23(b)(2) class. This Question is presented because it may be important in viewing the whole class action question. It is not necessarily a question upon which the Court would grant the Writ, standing alone.

XI.

APPEAL FROM THE SETTLEMENT JUDGMENT

If there is merit to the Petitioners' contention that a consent judgment without adjudication of the patent validity confers no res judicata effect to that consent Judgment, appeal was wasteful and unnecessary, even if Petitioners were parties to the action through the class device. Since they obtained no recompense whatever, they have a right to litigate.

If there is merit to the Petitioners' contention that their constitutional rights were violated by the machinations of the class representative, then the settlement judgment is a void judgment which has no effect on the Petitioners. They are free to litigate their claim.

RELIEF SOUGHT

1. This Court should reverse and remand this matter for further proceedings.

Respectfully submitted,

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APPENDIX A

FEDERAL TRADE COMMISSION DOCKET 7211

Nos. 18336-37

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES PFIZER & CO., INC., *Petitioner,* v. FEDERAL TRADE COMMISSION, *Respondent.*	PETITION to review and set aside an Order of The Federal Trade Commission.
AMERICAN CYANAMID COMPANY, *Petitioner,* v. FEDERAL TRADE COMMISSION, *Respondent.*	

Decided September 30, 1968.

Before: O'SULLIVAN, PHILLIPS and CELEBREZZE, Circuit Judges.

PHILLIPS, Circuit Judge. These consolidated cases involving the "wonder drug" tetracycline are before this Court a second time. In our earlier opinion, reported at 363 F.2d 757, this Court vacated the decision and order of the Commission and remanded the entire proceeding for a de novo hearing without the participation of the Chairman, who was held to be disqualified to sit in this case. Upon remand we directed that the Commission consider any evidence previously taken and additional admissible and relevant evidence on any issues raised by the complaint. Any party was authorized

to require the presence of any previously sworn witness for additional testimony either on direct or cross-examination.

Issues Previously Decided by this Court

For the assistance of the Commission on remand this Court passed upon two additional questions which were presented by the petitions for review at the former hearing:

(a) That, assuming the facts as found by the Commission to be supported by substantial evidence, the Commission had jurisdiction to require as a remedy the compulsory licensing of the tetracycline and aureomycin patents on a reasonable royalty basis; and

(b) That the record considered as a whole did not contain substantial evidence to support the decision of the Commission that the tetracycline patent was issued as a result of misrepresentations to the Patent Office and improper conduct on the part of Pfizer and Cyanamid.

In our former opinion this Court reached no decision on the issue of whether the petitioners fixed and maintained the price of tetracycline in substantial markets through a price fixing conspiracy.

Proceedings on Remand

Upon remand the Commission reopened the proceeding and remanded it to the "Chief Hearing Examiner for an assignment to an examiner to begin expeditious hearings." The remand proceeding was assigned to Hearing Examiner Abner E. Lipscomb.[1]

In its remand order the Commission specified that it was for the sole and limited purpose of receiving the testimony of Patent Examiner H. J. Lidoff[2] and of any other witness

[1] Robert L. Piper, the hearing examiner who originally heard the case and wrote the initial decision, was no longer in the employ of the Commission.

[2] Lidoff did not testify at the previous hearing.

who had testified previously, with respect to "the issue as to whether Pfizer and Cyanamid made misrepresentations to the Patent Office and withheld essential information, thereby deceiving Lidoff into granting a patent which otherwise never would have been approved."

In addition to the testimony of Examiner Lidoff, two witnesses for Pfizer testified at the new hearing. In his decision on remand the Hearing Examiner found that representatives of both Pfizer and Cyanamid made false and misleading statements to officials of the Patent Office and suppressed and withheld information, all of which were relevant and material to the consideration of the application by the officials of the Patent Office for a patent on tetracycline. Therefore, said the Hearing Examiner, officials of the Patent Office were misled into granting a patent on tetracycline which otherwise never would have been issued. The Hearing Examiner concluded that the acts and practices of Pfizer and Cyanamid constituted unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

With the Chairman not participating, the Commission adopted the findings and conclusions contained in the decision of Hearing Examiner Lipscomb as supplemented by its own opinion.[3]

The price-fixing aspect of the case is no longer before this Court. By an equally divided vote of two to two the Commission dismissed that portion of the complaint charging respondents with fixing and maintaining the price of tetracycline through a price-fixing conspiracy.

The Commission entered a final order on September 29, 1967, pertinent parts of which are set forth as Appendix A to this opinion. This order requires that Pfizer grant to any domestic applicant making written request therefor a

[3] The Commission also readopted findings 1 through 18 and 27 through 29 contained in its Findings as to the Facts and Conclusions of Law issued August 8, 1963, and Part II of its opinion accompanying the final order issued December 17, 1963.

non-exclusive, non-discriminatory license to make, use and sell tetracycline under all claims of Patent 2,699,054 (Conover patent); and that Cyanamid likewise grant a license under Patent 2,609,329 (Niedercorn "improved" patent for aureomycin).[4] The order provides for collection of royalties of two and one-half per cent under both patents.

Present Issue

The issue now before this Court is whether the findings of fact of the Commission are supported by substantial evidence. We answer this question in the affirmative and affirm and enforce the order of the Commission.

Much of the previous uncertainty in the record is eliminated by the testimony of H. J. Lidoff, the Patent Examiner who handled the Pfizer Conover application which ultimately resulted in the issuance of the tetracycline patent. At the time of the application Lidoff was an Assistant Examiner. Prior to the time when he testified as a witness, he had been promoted to membership on the Board of Patent Appeals. He is a career employee, having served with the Patent Office continuously since 1937.

Lidoff's testimony contradicts the inferences and findings of fact of Hearing Examiner Robert L. Piper in his initial decision and supports the initial findings of the Commission as well as the findings on remand.

The factual issues are discussed in some detail in the former opinion of this Court, 363 F.2d 757. The basic question is whether Pfizer and Cyanamid made misrepresentations to Lidoff and withheld essential information from him, thereby deceiving him into granting a patent on tetracycline which otherwise would never have been approved. The testimony of Lidoff, together with the Patent Office records, substantially support the affirmative findings of the Commission to this effect.

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[4] Cyanamid's earlier aureomycin Patent 2,482,055 (Duggar) expired in 1966.

Posture of Pfizer and Cyanamid to Obtain a Monopoly on Tetracycline

As pointed out in our earlier opinion, tetracycline has been described as "currently the best selling wonder drug in the United States." The complaint in this proceeding stated that the antibiotics industry is one of dynamic growth, with sales exceeding $330 million per year, and that tetracycline enjoys the largest sale by dollar volume, aggregating more than $100 million in 1957.

At the time the application for a patent on tetracycline was pending before the Patent Office, Pfizer and Cyanamid were in a posture to establish a monopoly in the production and sale of this drug which is of vital and unique importance in the treatment and cure of many diseases and of considerable impact upon the public health.

Penicillin was never patented. Nobody obtained a monopoly on it. Its production and sale proved to be fiercely competitive and profits were marginal.[5]

On September 13, 1949, Cyanamid obtained its patent on aureomycin (Duggar patent No. 2,482,055). On September 2, 1952, Cyanamid obtained an improvement patent on the Duggar process for producing aureomycin (Niedercorn patent No. 2,609,329). On July 19, 1950, Pfizer obtained a patent on terramycin (Sobin patent No. 2,516,080). As a result of these patents, Cyanamid and Pfizer have had a legal monopoly on the production and sale of aureomycin and terramycin, respectively.

On October 23, 1952, Pfizer filed its Conover application for a patent on tetracycline. This was followed on March 16, 1953, by Cyanamid's Boothe-Morton application for a patent on tetracycline. On October 29, 1953, Lidoff declared

[5] Cyanamid's attorney stated in a written memorandum to Lidoff in 1954, during the second interference proceeding, that Cyanamid would rather pay royalties on tetracycline to a bona fide patentee than see the pharmaceutical business in which it has a major interest ruined by irresponsible price cutting.

an interference for the purpose of determining priority of invention between these two applications.

In the meantime Heyden Chemical Company filed its Minieri application for a patent on tetracycline. On November 4, 1953, Cyanamid made a contract to acquire the Antibiotic Division of Heyden, including the rights to the Minieri patent application.

Thereupon Pfizer and Cyanamid executed a cross-licensing agreement.[6] Under this agreement, and with Heyden's Minieri application now owned by Cyanamid, these two companies were assured of sharing a monopoly on tetracycline if the Patent Office could be persuaded to grant a patent to either of them. Cyanamid then conceded that Pfizer's Conover application had priority in time and withdrew its Boothe-Morton application. This resulted in termination of the first interference on February 9, 1954, and removal of one obstacle from the pathway to obtaining a patent.

Another obstacle was an application filed by Bristol-Myers Company for a patent on tetracycline. As a result of Bristol's application, Lidoff declared a second interference, which continued from March 2, 1954, until October 14, 1954. The proceedings during this interference, its subsequent dissolution and the events following dissolution leading up to the ultimate granting of the patent to Pfizer encompass the issues of fact now before this Court.

Obligation of Parties in Patent Office Proceedings

The Patent Office, not having testing facilities of its own, must rely upon information furnished by applicants and their attorneys. Pfizer and Cyanamid, like all other applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful disclosure.

In *Kingsland* v. *Dorsey*, 338 U.S. 318, 319, the Supreme Court quoted with approval the following:

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[6] Negotiations had begun in November 1953. The formal agreement was executed January 11, 1954.

> "By reason of the nature of an application for patent the relationship of attorneys to the Patent Office requires the highest degree of candor and good faith. In its relation to applicants, the Office . . . must rely upon their integrity and deal with them in a spirit of trust and confidence. . . ."

In *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 818, the Court said:

> "Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. . . . Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies."

Initial Rejection of Pfizer's Application

In its opinion on remand the Commission found that in its conduct before the Patent Office Pfizer failed to abide by the standards of absolute candor and utmost good faith to which applicants and their attorneys must adhere in procuring a patent. The Commission also found that Cyanamid aided Pfizer in its efforts to secure the patent by deliberately withholding information which it knew or should have known was relevant to the patentability of tetracycline. The Commission concluded that the withholding of information together with the cross-licensing agreement constituted an illegal attempt by Pfizer and Cyanamid to share in an unlawful monopoly which in the light of the subsequent exploitation of the tetracycline patent resulted in a combination in restraint of trade in violation of Section 5 of the Federal Trade Commission Act.

These misrepresentations and the withholding of information related to the question of fact which Lidoff considered to be determinative to the issue of patentability: that is, whether tetracycline is inherently produced under the processes of the two aureomycin patents.

In an earlier ruling on the Minieri application dated September 28, 1953, Lidoff said that "the production of tetracycline as well as varying amounts of aureomycin . . . would appear to be inherent in the process of Duggar. . . . There is found no patentable invention in culturing Duggar's mutants under the same conditions and finding that tetracycline as well as [aureomycin] is produced."

On November 14, 1954, Lidoff dissolved the second interference, ruling that tetracycline is not patentable because it appeared to lack novelty. Because of the disclosures of the Minieri application Lidoff ruled that tetracycline is unpatentable because it is produced in the processes of Cyanamid's Duggar and Niedercorn patents. His written ruling contained the following language:

> "Duggar and Niedercorn each produce an antibiotic, disclosed as 'Aureomycin' by a fermentation process employing *streptomyces aureofaciens* and mutants thereof. The antibiotic is identified as an antibiotic by assay against bacteria. It appears from the disclosure of Minieri et al (a party to interference No. 86,861 in an application available to all the parties) that tetracycline is *also* produced in such a fermentation process and that larger proportions thereof are produced when the amount of chloride in the fermentation medium is low. . . . Minieri et al clearly and specifically disclose that the microorganism used to prepare *tetracycline* belongs to the Duggar et al U S 2,482,055 species."[7]

[7] Lidoff's written ruling is quoted in part at 363 F.2d 775, n. 12. He said: "It has long been held that a purer form of an old product is not inventive."

Misrepresentations and Withholding of Pertinent Information by Pfizer

On November 29, 1954, Pfizer's patent representatives met with Lidoff at his office concerning the rejection of the application. A written summary of the interview was prepared by Pfizer's representatives and filed with the Patent Office.[8] Representation was made on behalf of Pfizer that there was no reasonable basis for Lidoff's speculation "as to the coproduction of tetracycline in the prior art processes." The written summary recites that Lidoff felt that he was justified in relying upon the disclosure of Minieri "as giving rise to a rebuttable assumption of inherent production." Pfizer's representatives denied that any such prima facie assumption is justified and asserted that "the available evidence is overwhelming contrary to the Examiner's assumption." Pfizer also argued that Cyanamid, which had manufactured literally tons of aureomycin under its Duggar and Niedercorn patents, had failed to discover *any* tetracycline in its large-scale manufacture, although Cyanamid had devoted extensive research to the recovery, purification and properties of aureomycin. It was argued that the experience of Cyanamid "should conclusively refute the tenuous basis for the Examiner's unwarranted assumption." The summary further states that Lidoff adhered to his position that he would not withdraw his rejection unless the applicant would submit a showing overcoming his speculated basis for rejection.

Pfizer then embarked on a program to convince Lidoff that his finding of inherent coproduction was erroneous.

Pfizer's patent agent previously had issued memoranda to two Pfizer scientists on October 15, 1954, instructing them to conduct work on the question of coproduction of tetracycline, informing them that the work was in connection with the prosecution of the patent application and that the results might be used in preparing affidavits to be filed with the Patent Office.

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[8] The summary is quoted in part at 363 F.2d 775-76.

The Niedercorn patent on aureomycin contained forty-four samples or examples of media. Two broths were prepared by Pfizer scientists in accordance with the specifications set forth in Example 1. These tests showed that approximately five per cent of the total antibiotic activity in the filtered broth consisted of tetracycline. The results of this test were never disclosed to Lidoff, although expert testimony established that tetracycline could have been recovered from Example 1 broths at the time of these tests in October 1954. The Hearing Examiner found that if Pfizer's representatives had disclosed to Lidoff in the conference on November 19, 1954, the results of the tests of Example No. 1, this would have confirmed Lidoff's conclusion of inherent coproduction and would have ended the matter. No further test would have been specified, and the patent would never have issued. Lidoff testified that if he had been furnished this information concerning Example 1, "I would not have allowed the patent."

Instead Pfizer's representatives suggested that tests be made to determine whether tetracycline could be recovered from Niedercorn Example 28. They did not disclose to Lidoff that earlier tests conducted by Pfizer scientists demonstrated Example 28 broths to be so poor in antibiotic potency that they revealed neither aureomycin nor tetracycline.

The written summary of the interview with Lidoff on November 19, 1954, prepared by Pfizer's representatives, states that Lidoff required evidence that fermentation broths produced "strictly in accordance with the Duggar and Niedercorn disclosures . . . . do not contain recoverable amounts of tetracycline."

Pfizer conducted its tests on Example 28, which previous experience demonstrated contained no tetracycline, instead of Example No. 1, which produced approximately five per cent of recoverable tetracycline. Lidoff denied that he selected Example 28 and testified: "I was interested in the conditions most likely to produce tetracycline – period." The Hearing

Examiner found that, in its tests on one of the two Example 28 specimens, Pfizer did not adhere strictly to the Duggar and Niedercorn disclosures. The Niedercorn patent states that "for maximum growth, it is necessary that the pH of the fermentation medium be controlled within rather narrow limits. Highly effective growths may be obtained within the range of about 5.0 to 8.0. Best results are obtained within the range of approximately 6.4 to 6.7." The Hearing Examiner emphasized that Pfizer's affidavit represented that the entire fermentation was conducted at a pH of 6.7, whereas the beginning fermentation in one of the examples had a pH at 8.1, and was adjusted downward to 7.1 six and one-half hours later.

Pfizer's representatives failed to disclose to Lidoff the deficiencies in the Example 28 fermentation. Instead the affidavit was drafted to show that the Niedercorn Example 28 test was conducted throughout at the best possible pH for antibiotic growth. The Hearing Examiner further found that notwithstanding the low potency of the Niedercorn Example 28 test broth, Pfizer's representatives misleadingly told Lidoff that this broth was "truly representative" of a Niedercorn Example.

Lidoff testified: "[N]ormally we would expect that the precise conditions of the example would be duplicated to present a proper comparison. Any deviation therefrom without being put in the record would not be a proper presentation of the case. . . ."

"[H]ad it been called to my attention that there was a difference in pH, I would automatically have pointed out that there was not a proper comparison — that comparisons to be proper must be duplicates. . . ."

"[A] test run at 8.1 would not in my opinion be properly representative of an example which in accordance with the specific disclosure of the Niedercorn patent obtained best results at a pH from 6.4 to 7."

Pfizer submitted affidavits to Lidoff, executed by two of

its scientists, reporting unsuccessful efforts to recover tetracycline from Example 28 fermentation broths. Lidoff requested still more information in affidavit form as to the possibility of recovering tetracycline. On December 9, 1954, another interview was held between Pfizer's representative and Lidoff and a supplemental affidavit was filed stating: "[I]n fact there was no indication whatever of the presence of tetracycline."

In support of its Bogert application No. 423,247 for a process patent for separating antibiotics Pfizer's representative stated in a written document filed with the Patent Office May 4, 1955:

> "The Examiner points out that the reference treats the products of the Duggar process and he concludes that such products 'inherently contains tetracycline.' It is believed that the Patent Office is aware of the fact that this 'inherent' production of tetracycline by the Duggar process is not in fact true."

It is to be emphasized that at the time of these representations Lidoff was still groping for information. Pfizer already had established coproduction as a *fact* while to Lidoff this remained a matter of *speculation*. The Commission correctly held that it was the obligation of Pfizer to disclose the results of the Example 1 tests and the deficiencies and variations in the Example 28 tests. Under the circumstances Pfizer cannot disclaim this responsibility because Lidoff, who was never informed of the Example 1 tests, did not expressly require use of Example 1 instead of Example 28.

Convinced by Pfizer's representatives that tetracycline was not inherently coproduced in manufacturing aureomycin, Lidoff changed his decision and granted the patent.

We hold that there is substantial evidence to support the Commission's findings that Pfizer suppressed material information relative to the results of the Example 1 tests and to both the extremely low potencies of the Example 28 broth

tests and the fact that during the initial stages of fermentation of one of the two tested broths the pH factor exceeded substantially the optimum range prescribed in the Niedercorn patent. We further hold that substantial evidence supports the Commission's conclusion that Pfizer made misrepresentations of material facts and withheld pertinent information, thereby obtaining a patent on tetracycline which otherwise never would have been issued.

Withholding of Pertinent Information by Cyanamid

During a conference with Cyanamid's patent counsel on November 16, 1953, Lidoff inquired whether strains used by Cyanamid in making aureomycin might have produced tetracycline. The attorney replied that he did not know but would find out and advise Lidoff. Cyanamid's counsel made inquiry and reported to Lidoff that Cyanamid "can unequivocally state that there has not been any tetracycline produced by them, inadvertently or otherwise."

Early in 1954 Cyanamid scientists conducted tests on old samples of aureomycin and found evidence that tetracycline was present. Further tests by Cyanamid scientists confirmed the findings of the prior tests showing coproduction of tetracycline. The record supports the finding of the Hearing Examiner that Cyanamid knew during 1954 that aureomycin contained tetracycline; that analysis of aureomycin fermentation broths on January 20, 1954, showed tetracycline in five of the six samples tested; and that other tests by Cyanamid conclusively confirmed the presence of tetracycline in aureomycin.

On February 25, 1954, the Cyanamid Director of Mycology Research sent out a memorandum to five other Cyanamid scientific personnel and to patent counsel which contained information that the tests of some old samples of aureomycin which had been produced in 1948 showed that they contained one to six percent tetracycline. Cyanamid's patent counsel testified that he did not remember seeing this memorandum

until just prior to the Commission hearings in 1959. The Commission found that "counsel had ready access" to the information. Written on the face of this memorandum, which Cyanamid produced from its files in 1958 pursuant to a Commission subpoena, were the words "All copies were ret'd and destroyed." Under the rule of candor and truthfulness required of applicants before the Patent Office, the contents of this memorandum, contradicting Cyanamid's previous representations, should have been revealed to Lidoff. The record is silent as to which Cyanamid official directed that all copies of this highly significant document be returned and destroyed. Accepting as correct the testimony of Cyanamid's patent counsel that he had no recollection of having seen it at that time, responsibility for suppressing the facts shifts to the unknown Cyanamid official who directed that all copies be recalled and destroyed. We agree with the Commission that Cyanamid cannot escape responsibility for these actions.

At no time while Pfizer's patent application was pending or during the interference proceedings did Cyanamid disclose to the Patent Office that its previous representations were erroneous and that tetracycline was present in aureomycin broths. Not until several months after the patent had been issued to Pfizer did Cyanamid advise the Patent Office that, according to "recently" performed tests, tetracycline was found to be coproduced in Duggar-type fermentations and to be present in aureomycin broths.

We agree with the Commission that, because of its strong economic interest in having Pfizer awarded a patent, the fruits of which Cyanamid would share under the cross-licensing agreement, Cyanamid was under the same duty as Pfizer to reveal to the Patent Office information which it had reason to know was material to Pfizer's application.

In summary, Lidoff had made specific inquiry of Cyanamid's patent representative in his effort to reach a correct decision as to the novelty of tetracycline. The patent attorney gave

an unequivocal answer that no tetracycline was produced in Cyanamid's aureomycin commercial operations or in aureomycin broths. This reply was erroneous since tetracycline is and always has been present in aureomycin and is inherently produced in the Duggar and Neidercorn processes. We agree with the Hearing Examiner that "if Cyanamid's patent representative did not know the true facts, he was nevertheless under a duty to know them and under a duty to reveal the truth to the patent examiner."

The Hearing Examiner found that during the summer of 1954, while the second interference was in progress, Cyanamid's representative, in papers filed with the Patent Office, continued to deny any inherent production of tetracycline in aureomycin and that "Cyanamid's knowledge was exactly contrary to its Patent Office statements."

Lidoff testified that if Cyanamid had informed him during the second interference proceedings that aureomycin contained two to four per cent tetracycline, he would have used that as a basis for rejecting all applications claiming the compound tetracycline. He further testified positively that, if Cyanamid had disclosed to him this information, he would have refused to issue the patent and would have held that tetracycline was not novel and was unpatentable because (1) it was produced under the process of prior patents and (2) it was available to the public prior to the filing of Pfizer's application.

Questions Left Unanswered in Former Decision of Commission

Appendix G to our former opinion, 363 F.2d at 817-22, contains numerous examples of contrary inferences drawn from the same evidence by Hearing Examiner Piper in the initial decision and by the Commission in its findings of facts.

At page 363 F.2d 777 are set forth certain material questions which had not been clearly answered in the record then before the Court. Lidoff answered these questions spe-

cifically, supporting the Commission's original findings of fact and contradicting the findings of Hearing Examiner Piper in his initial decision.

Pertinent testimony by Lidoff on these questions is set forth in Appendix B to this opinion.

The opinion of the Commission summarizes Lidoff's testimony as follows:

> "Lidoff testified in this connection that as of December 9, 1954, and prior thereto he did not know as a fact that any tetracycline was inherently produced in the Duggar and Niedercorn patent fermentations; that he had speculated on the basis of information contained in the Minieri application that some tetracycline was present in the fermentation broths made pursuant to the teachings of Duggar and Niedercorn; that if tetracycline was inherently produced by these prior art processes and could be identified in the broths he was of the opinion that it lacked novelty and could not be patented; that Hutz and Murphy had vigorously denied at the time that such coproduction occurred; and that the factual question that he was attempting to get answered was whether identifiable tetracycline was or was not present in the broths of the Duggar and Niedercorn patents. Above all, he testified that had he been told by Pfizer that 5% of the antibiotic content of a Niedercorn Example 1 broth was tetracycline he would never have allowed the patent. He further testified that if he had known that commercial Aureomycin contained tetracycline he would have also rejected the Conover application on a different and additional statutory ground."

Admissibility of Lidoff's Testimony

At the former hearing before this Court Pfizer's attorneys stated that Pfizer had urged that Examiner Lidoff be called as a witness by the Commission and had requested an opportunity to interview him, but that their request had been denied. Pfizer complained vigorously of the failure of the Commission to call Lidoff as a witness.

On remand Lidoff was called as a witness and testified at length both on direct and cross-examination. Pfizer now contends that the testimony of this witness is based upon his "reconstructed state of mind," is conjectural and irrelevant and does not constitute admissible evidence.

Lidoff admitted that he did not have an independent personal recollection of all details of his interviews with representatives of Pfizer and Cyanamid. However, his testimony is not based upon mere habit but is grounded upon written records, including documents prepared by him, combined with his familiarity with Patent Office practices, procedures and policies. His written initial rejection of Pfizer's application (see 363 F.2d at 775, n. 12) was more than a "past recollection recorded;" it constituted the very act of rejection. As the author of this document, he is the most authoritative interpreter of its content. We hold this testimony to be admissible. Wigmore on Evidence, §§ 98, 747.

The failure of Lidoff to recall details of interviews conducted by him eleven years earlier is a matter addressing itself to his credibility. Questions of credibility and testimonal weight are issues upon which the courts do not second-guess the Hearing Examiner and the Commission. *Niresk Industries Inc.* v. *Federal Trade Commission*, 278 F.2d 337, 341 (7th Cir.), cert. denied, 364 U.S. 883. The Hearing Examiner, who observed the demeanor of Lidoff while he was testifying, credited his testimony and commented as follows: "Moreover, it has been our observation that the witness who remembers too well and too clearly may be less credible than the witness who has difficulty in remembering." The Hearing Examiner further said:

> "Mr. Lidoff's testimony, which was presented clearly and unequivocally, explains the numerous factual problems that confronted both the Commission and the Court in their evaluations of the original record; and it supplements and explains clearly proven facts in the record. These facts, combined with Mr. Lidoff's testimony, pre-

sent clear, convincing and substantial evidence to support and sustain the facts herein found."

Other Contentions of Petitioners

Pfizer continues to assert that Lidoff was interested only in "appreciable" and "recoverable" amounts of tetracycline. Lidoff testified that "[t]he proportion or amount was not significant. The presence was the important thing." As stated by the Hearing Examiner:

> "In fact, the presence of identifiable tetracycline in the fermentation broths produced pursuant to the prior Duggar and Niedercorn patents '. . . was the crux of the whole issue.' Further, Patent Examiner Lidoff made it clear that it was not necessary for a therapeutic product to be coproduced, or for sufficient tetracycline to be present to give tetracycline activity to the mixture, or for commercial amounts of tetracycline to be coproduced. It was only necessary that there be sufficient tetracycline to be identified."

His testimony on this point is supported by his written action of November 24, 1954 (quoted at 363 F.2d 775, n. 12). Pfizer's contention is based upon its interpretation of words written by its own attorneys in the summary of their interview with Lidoff. The Commission adopted a contrary interpretation of these words, and we find this conclusion to be both reasonable and supported by substantial evidence.

Pfizer further contends that, even if Lidoff was interested in less than "appreciable" or "recoverable" amounts of tetracycline in auteomycin broths, he failed to convey his thoughts to Pfizer's representatives and they were not guilty of any misrepresentations. We hold that substantial evidence supports the Commission's conclusion that the Patent Office records were sufficient to put both Pfizer and Cyanamid's representatives on notice that Lidoff was interested in ascertaining whether any tetracycline was inherently produced in the

aureomycin broths, and not ten per cent or other "appreciable" or "recoverable" amounts as now contended.

In any event, under the standards of candor and trust required of applicants before the Patent Office, it was the obligation of both Pfizer and Cyanamid to make a full disclosure, even though they understood Lidoff to be interested only in "appreciable" or "recoverable" percentages.

Pfizer contends that substantial evidence is not the correct yardstick required to sustain the order of the Commission but that the proper standard of proof to support a finding of misrepresentation is "clear, unequivocal and convincing" evidence as in cases of fraud. On the record before us, we could conclude that the Commission's findings of misrepresentation and withholding of material information on the part of both Pfizer and Cyanamid are supported by clear, unequivocal and convincing evidence. In our former opinion, however, this Court held that substantial evidence was the correct standard to be applied in reviewing this order of the Commission. We adhere to that view.

Another argument advanced by Pfizer is that Lidoff's interpretation of patent law as to patentability of an unintentionally produced chemical compound is contrary to the controlling decisions. This is not the question before us. The Commission did not undertake to pass upon the validity of the patent, nor do we. The order of the Commission treats the patent as valid and requires compulsory licensing. The issue here is a violation of Section 5 of the Federal Trade Commission Act, not the validity of a patent. In our former opinion this Court held that, assuming the facts found by the Commission to be supported by substantial evidence, the Commission had jurisdiction to require as a remedy the compulsory licensing of the tetracycline and aureomycin patents on a reasonable royalty basis.

It is further argued by Pfizer that Lidoff vacillated on his views of patentability and therefore his testimony on the standard of patentability which guided him is not credible.

To the contrary, the record shows that Lidoff's alleged changes of position were not due to changes in his concept of patent law but to changes in his understanding of the facts. His decision to grant the patent to Pfizer after having denied it initially was caused by the misrepresentations of facts and the withholding of pertinent information which have been discussed in detail in this opinion.

All the other contentions of petitioners have been considered and found to be without merit.

The order of the Commission is affirmed and enforced.

APPENDIX A

EXTRACTS FROM COMMISSION'S FINAL ORDER OF SEPTEMBER 29, 1967

IT IS FURTHER ORDERED that the findings and conclusions contained in the initial decision following remand be, and they hereby are, adopted as the findings and conclusions of the Commission as supplemented by (1) the accompanying opinion of the Commission, (2) findings 1 through 18 and 27 through 29 contained in the Commission's Findings as to the Facts and Conclusions of Law issued August 8, 1963, and (3) Part II of the Commission's Opinion accompanying the Final Order issued December 17, 1963.

IT IS FURTHER ORDERED that respondent Chas. Pfizer & Co., Inc., grant to any domestic applicant making written request therefor, a non-exclusive, non-discriminatory license to make, use, and sell tetracycline under all claims of United States Patent 2,699,054. Said licenses granted hereunder shall be for the full, unexpired term of said patent and shall contain no restriction or limitation, except that such licenses may contain provisions in a form customary in such patent licenses, allowing the licensor to collect royalties of not more than two and one-half (2½) percent of the net sales of tetracycline manufactured or sold under said licenses, providing for the inspection of books and records by independent auditors to determine the correctness of any royalty payment, and providing for the cancellation of the licenses at the option of the licensor upon failure of the licensee to permit such inspection or to pay royalties due and payable. Said licenses shall provide that in the case of the licensor granting or having granted more favorable terms to any other licensee, the licensee under said license shall be entitled to equal treatment; *Provided, however,* that respondent may require any such applicant to pay upon acceptance of a license an amount not exceeding $2,500 which shall be applied against future royalty payments.

IT IS FURTHER ORDERED that respondent American Cyanamid Company grant to any domestic applicant making written request therefor, a non-exclusive, non-discriminatory license under all claims of United States Patent 2,609,329. Said license granted hereunder shall be for the full, unexpired term of the patent licensed and shall contain no restriction or limitation on the licensee's right to make and sell tetracycline, except that such licenses may contain provisions, in a form customary in such patent licenses, allowing the licensor to collect royalties of not more than two and one-half (2½) percent of the net sales of tetracycline manufactured under said licenses, providing for the inspection of books and records by independent auditors to determine the correctness of any royalty payment, and providing for the cancellation of the licenses at the option of the licensor upon failure of the licensee to permit such inspection or to pay royalties due and payable. Said licenses shall provide that in the case of the licensor granting or having granted more favorable terms to any other licensee, the licensee under said license shall be entitled to equal treatment; *Provided, however,* that respondent may require any such applicant to pay an amount not exceeding $2,500 which shall apply against future royalty payments under any patent or patents licensed hereunder.

IT IS FURTHER ORDERED that respondents Chas. Pfizer & Co., Inc., and American Cyanamid Company each refrain from making any assignment, sale, or other disposition of any of the patents required to be licensed hereunder which would deprive it of the power to issue licenses pursuant to this order unless said respondent requires as a condition of such disposition that the purchaser, assignee, or licensee shall observe the provisions of this order with respect to such patent and that the purchaser, assignee, or licensee file with the Commission a written undertaking to be bound by such provisions; *Provided, however,* that one or both of said respondents may dedicate any such patent, patents, or a general patent license to the general public in lieu of issuing licenses pursuant to the provision of this order.

IT IS FURTHER ORDERED that respondent American Cyanamid Company furnish to any person licensed under this order, and making written request therefor, whatever technical information and know-how that American Cyanamid Company has in the past furnished Chas. Pfizer & Co., Inc., relating to the manufacture and use of chlortetracycline, said technical information and know-how to include a furnishing of viable S. *aureofaciens* cultures that are identical to or equivalent to any cultures furnished Chas. Pfizer & Co., Inc. The information to be made available hereunder shall be made available without charge other than the expense to respondent of furnishing such information; *Provided, however,* that respondent American Cyanamid Company may require any such licensee to agree to keep said technical information and know-how confidential.

IT IS FURTHER ORDERED that respondent Chas. Pfizer & Co., Inc., furnish to any person licensed under United States Patent 2,699,054 pursuant to this order, and making written request therefor, whatever technical information and know-how that Chas. Pfizer & Co., Inc. has in the past furnished American Cyanamid Company relating to the manufacture of tetracycline by the deschlorination process. The information to be made available hereunder shall be made available without charge other than the expense to respondent of furnishing such information; *Provided however,* that respondent Chas. Pfizer & Co., Inc., may require any such licensee to agree to keep said technical information and know-how confidential.

IT IS FURTHER ORDERED that respondents American Cyanamid Company and Chas. Pfizer & Co., Inc., shall within sixty (60) days after the effective date of this order file with the Commission a written description of the know-how and technical information required to be furnished under Paragraphs 6 and 7.

IT IS FURTHER ORDERED that that portion of the complaint charging respondents with fixing prices be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that respondents American Cyanamid Company and Chas. Pfizer & Co., Inc., each shall file with the Commission within sixty (60) days after the effective date of this order, a report in writing under oath, signed by each respondent, setting forth in detail the manner and form of its compliance with this order.

By the Commission, Chairman Dixon not participating; and Commissioner Jones dissenting from that portion of the order permitting respondents to collect royalties under the patents.

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

APPENDIX B

EXCERPTS FROM TESTIMONY OF H. J. LIDOFF

Q. Now, Mr. Lidoff, the Sixth Circuit Court of Appeals, in remanding this proceeding to the Commission, propounded certain questions or inquiries, and I would like to take those up with you at this time, and there will be some repetition of what you have already stated.

Mr. Lidoff, I want to ask you if at the time the notice of allowance was issued in Pfizer's Conover application, and prior thereto, to what extent were you aware of inherent coproduction of tetracycline in aureomycin broths and in the finished product? A. I was not aware of such information, at least in any available form that could be applied in rejecting the application.

Q. The second question of the Court.

In handling applications, including Pfizer's Conover application, for a product patent on tetracycline, were you concerned only with co-production in aureomycin as a finished product, or was your inquiry also directed to co-production

in aureomycin fermentation broths? A. Overall I was interested in the prior production in any manner of tetracycline, specifically in this interest the production of tetracycline in conjunction with aureomycin, in view of the references which dealt with, at least ostensibly dealt with the production of aureomycin.

Q. Was the Federal Trade Commission Hearing Examiner that handled this case initially correct or incorrect in his finding that if you had known that old aureomycin contained from two to five per cent tetracycline, you would nevertheless have granted the Pfizer tetracycline patent to Pfizer? A. Well, as pointed out before, while it would have been based on a different portion of the statute, I would not have allowed the Conover patent had I known that prior commercial aureomycin actually contained tetracycline, noting, of course, that this is a different rejection than the rejection that we have been discussing which I did make.

Q. Which you did what? A. Which I did make. That the rejection in the file is a different rejection than that which would have been raised had this been known as a fact.

Q. Next question of the Sixth Circuit Court of Appeals. Did you consider any amount of co-production of tetracycline in aureomycin under 10 per cent to be immaterial in your handling of the Pfizer application for patent on tetracycline? A. Well, that sentence is a little involved. No, I did not consider that production of any amount under 10 per cent to be immaterial because–

Q. Is that immaterial? A. Immaterial – because the production of any amount regardless of the numerical value would in my opinion have at that time properly supported the rejection. In other words, there is no numerical limitation to the amount of tetracycline produced. The important factor, in my mind, was was any tetracycline produced.

Q. Why did you request tests by Pfizer of Niedercorn Example 28, if you did, rather than requesting tests of other examples among the 44 listed in the Niedercorn patent – and

this is the Court's question — at least one of which, Example 1, the Commission found would have disclosed 5 per cent co-production. A. This requires some generalization here.

First of all, a patent examiner does not require tests. A patent examiner makes a rejection and in order to overcome this rejection, an applicant may, if he desires, present so-called tests or comparisons or any other data normally in affidavit form.

It is not the function of the patent examiner either to require tests or to point out specifically what tests should be made. Normally, however, a compromise has to be reached in view of the facilities available to the applicant for making the tests, and none are available to the patent examiner to check the tests. Normally a compromise is reached, and applicants present affidavits, present tests and comparisons, and based upon these an Examiner makes up his mind, realizing that they are not necessarily the best or the ultimate in comparisons and in testing.

It is a question of working out the best possible compromise.

Now, I will say further that an Examiner will, in discussion, attempt to select from tests presented to him, or from data presented to him, if so asked — will attempt to point out the more convincing evidence. However, the selection of the test is normally in the province of the applicant.

Q. Well, did you limit Pfizer to Example 28? A. Definitely no, I would not have. Now, remember, I don't recall precisely — I cannot. But I would not have limited testing to any example. I might have suggested that that looked the most promising, but I would not have limited the test to that example.

Q. Now, this is another question of the Sixth Circuit, and I will read it.

In your handling of the Pfizer Conover application for a patent on tetracycline, were you interested in establishing only that the prior art processes did or did not produce

tetracycline in appreciable – and that is in quotes – amounts, making possible its prior recovery as a therapeutic product. A. First of all, I was not – I would not have been interested in recovering a therapeutic product. The claim was directed to a compound per se, not to a therapeutic product. So that my interest would have been identification of the material tetracycline as present.

However, we run into some semantics here – and I know we will further on, as to recovery of appreciable amounts and so forth – and I might summarize that my interest was in determining whether or not the material tetracycline was present.

However, at that time at least, most methods of identifying and determining the presence of this material would have in the broadest sense been encompassed by the word "recovery". You normally in order to identify something recover it to the extent of at least separating it from some of its impurities. So that while we are bandying words back and forth, the important factor in my view of patentability was that if any identifiable amount of the material were present, a valid patent could not issue, and regardless of what language we end up using, this is what I was after.

Q. I see.

Was the Federal Trade Commission Hearing Examiner correct in his conclusion that you knew "for more than a year prior to the decision on the second interference" that fermentation broths produced under Duggar and Niedercorn usually contain tetracycline, or was the Federal Trade Commission correct in its conclusion to the contrary? A. The answer is I did not know.

Q. Did you draw a distinction as to the significance of co-production as between product and process applications as found by the FTC Hearing Examiner, or was the Federal Trade Commission correct in reaching its contrary conclusion? A. Simply speaking, I did not make a distinction in my mind between the two. This will probably later demand some

explanation as to these office actions dealing with fermentation processes and products. If you wish the explanation now, I can put it into the record.

Q. Well, when you say you did not draw a distinction between the two, you mean between the product application and the fermentation process application. A. Correct.

Q. Was the amount — rather, was the co-production of any tetracycline equally a factor in both these types of applications? A. No, not equally. In a product claim, the presence of the tetracycline was a determining issue. In a process claim, the process parameters were the important thing, and the product so produced of less significance. So there is a great distinction as to the weight to be given to this co-production.

Q. Is any — is the co-production of any tetracycline relevant to a product application? A. In my opinion, the production of any tetracycline is the most important factor in an application containing claims to the product tetracycline.

Q. The next question I have concerns the Taylor affidavit which you have earlier answered.

[Lidoff testified that he does not remember seeing Bristol's Taylor affidavit, which was filed six days before the patent was issued, but that "the odds are very greatly against my having seen it."]

The next question I will ask you is a question posed by the Sixth Circuit Court of Appeals as follows.

Would your decision to grant the Pfizer Conover patent have been different if Cyanamid had revealed that it was in error in its prior assurances that there was no co-production of tetracycline in aureomycin, or were you already aware of the fact that aureomycin contained tetracycline? A. A, I was not aware of the fact.

Q. I didn't get that answer. A. A — I was not aware of the fact that aureomycin actually contained tetracycline. And B, as I pointed out before, the availability of this knowl-

edge, the form in which the knowledge was available, would have been the most important thing. That is to say, it has to be in a publication that could be used. The fact that Cyanamid may have admitted it in a record, in a Cyanamid application, would not have been of significance in the prosecution of the Conover application once it was separated from the interference.

Q. Why? A. Because as I pointed out in the Patent Office information in one application, an application assigned to an assignee, cannot be employed to reject another application — an application of a different assignee. The basis for such rejections are normally publication.

Now, that would have to do with published matter.

Now, in addition to that, we have not separated from that particular question whether this information had to do with aureomycin produced in accordance with Duggar and Niedercorn, and that commercially available. That is, we had to split that also.

Q. Well, now, if Cyanamid had revealed during the second interference proceeding between Cyanamid, Pfizer and Bristol, that it was in error in its prior assurances, that there was no co-production in aureomycin, would your decision to grant the Pfizer Conover patent have been different? A. The answer is yes, and let's break it down into two parts.

If they had admitted during the interference that following Duggar or Niedercorn a broth would be produced which contained tetracycline, then I would have maintained the rejection which we did present based upon the Duggar and Niedercorn application.

If, on the other hand, the admission was that commercial aureomycin previously sold to the public had contained tetracycline, then the rejection would have been a different rejection based on a different section of the statute, but nevertheless would have prevented issuance of the patent.

Q. Does that include the Conover patent? A. Yes—it includes all of them. As long as they were in interference,

it would include any application then in that interference — because the information would then have been available to all parties, and they could have had a chance to rebut it ex parte.

APPENDIX B

STATE OF WEST VIRGINIA, Plaintiff,

v.

CHAS. PFIZER & CO., Inc., American Cyanamid Company, Bristol-Myers Company, Olin Mathieson Chemical Corporation, and The Upjohn Company, Defendants.

No. 68 Civ. 240.
and other antibiotic drug antitrust actions.

United States District Court,
S. D. New York.

June 24, 1970.

As Amended Sept. 18, 1970.

WYATT, District Judge.

This is an application by defendants and by plaintiffs in these class actions for approval of a proposed compromise under which the actions and all claims of the classes therein will be settled and dismissed with prejudice. Fed.R.Civ.P. 23 (e) The application is granted and the proposed compromise is approved.

These are 66 civil actions, 26 of which were commenced in this District and 40 of which were transferred to this District by the Judicial Panel on Multidistrict Litigation (the Panel) "for coordinated or consolidated pretrial proceedings" (28 U.S.C. § 1407; see 295 F.Supp. 1402, 297 F.Supp. 1126, 299 F.Supp. 1403, 301 F.Supp. 1158, 303 F.Supp. 1056, 309 F.Supp. 155). The 66 civil actions which are the subject of the present application are sometimes referred to in this opinion as simply "these actions".

The same five companies are defendants in each of these actions (Squibb Beech-Nut, Inc. is also a defendant in some actions); they may be referred to as Pfizer, Cyanamid, Bristol, Squibb (a

division of defendant Olin Mathieson Chemical Corporation until about January 1, 1966 and ultimately a part of Squibb Beech-Nut, Inc.), and Upjohn. They have been for some years sellers of broad spectrum antibiotic drugs, the most important of which is tetracycline and on which a patent, owned by Pfizer and often called "the Conover patent", issued on January 11, 1955. Pfizer, Cyanamid and Bristol made tetracycline and sold it in dosage form. Bristol sold tetracycline in bulk to Squibb and Upjohn which sold it in dosage form.

Antibiotic drugs are prescription drugs used for infectious diseases. Broad spectrum antibiotic drugs, such as tetracycline, are effective against a wider range of germs than are the narrow spectrum antibiotic drugs, such as penicillin. The word "antibiotics" when used in this opinion refers to broad spectrum antibiotic drugs.

There are in total before this Court some 150 similar civil actions against the same defendants, either commenced in this District or transferred here by the Panel. These some 150 actions are divided into the following groups: (a) the 66 actions which are the subject of the present application; (b) some actions in which plaintiffs were offered but rejected the same proposed settlement on which the present application is based; (c) some actions in which plaintiffs have not been offered any settlement by defendants; and (d) about 26 actions in which plaintiffs are private hospitals to which a separate offer of settlement has been made by defendants.

The claim in each of the actions is that defendants violated the antitrust laws in the sale of antibiotics, specifically Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2); treble damages are sought, as authorized in 15 U.S.C. § 15.

A. DEVELOPMENT OF BROAD SPECTRUM ANTIBIOTICS

Data as to the four principal broad spectrum antibiotics are as follows:

Generic Name	Trade Name	First Introduced	By Whom
chlortetracycline	Aureomycin	December 1948	Cyanamid
chloramphenicol	Chloromycetin	January 1949	Parke, Davis
oxytetracycline	Terramycin	March 1950	Pfizer
tetracycline	Achromycin	November 1953	Cyanamid
	Tetracyn	January 1954	Pfizer
	Polycycline	April 1954	Bristol
	Steclin	September 1954	Squibb
	Panmycin	October 1954	Upjohn

Cyanamid owns the patent for chlortetracycline (the Duggar patent), issued September 1949, and an improvement patent (Niedercorn) issued September 1952.

Pfizer owns the patent for oxytetracycline (the Sobin patent) issued July 1950.

When the Duggar and Sobin patents issued, the chemical structure of the antibiotics produced—trade names, Aureomycin and Terramycin—were not known.

In 1952, a Pfizer research team made the first discovery of the chemical structure of Aureomycin and Terramycin. On June 17, 1952, Conover, a member of the Pfizer team, discovered tetracycline by removing the chlorine atom from Aureomycin.

Tetracycline proved to be highly superior to the earlier antibiotics.

The discovery of tetracycline was announced to the world in an article on

August 8, 1952 in the Journal of the American Chemical Society. On October 23, 1952, application for the Conover patent was filed. Thereafter, applications for tetracycline patents were filed by Cyanamid and by Bristol, among others.

It eventually developed that to produce tetracycline, it was necessary to use the Duggar and Niedercorn patents for the fermentation process. If a patent on the Conover invention were issued to Pfizer, then neither Cyanamid nor Pfizer could make tetracycline except by agreement between them. Each would be blocked by a patent of the other.

After meetings on November 7 and 15, 1953 between McKeen (Pfizer) and Malcolm (Cyanamid) an agreement was made by which Cyanamid would license Pfizer under the Duggar and Niedercorn patents; in addition, it was agreed that proofs of priority on tetracycline would be exchanged; that the party found (on such exchange of proofs) not to have priority would then concede priority to the other; and that the party receiving the patent on tetracycline would then license the other.

Bristol began making and selling tetracycline in May 1954. It sold the drug in bulk to Squibb and to Upjohn, who in turn sold in dosage form under their respective trade names. Bristol also sold in dosage form under its trade name.

Cyanamid brought an action against Bristol in September 1954, asserting that in making tetracycline Bristol infringed the Duggar and Niedercorn patents. This action was settled in December 1954 and Bristol received a license (with royalty to Cyanamid) for use of the Duggar and Niedercorn processes in making tetracycline.

After an exchange of evidence as to priority, Cyanamid conceded in February 1954 that Conover was prior in discovery of tetracycline.

The Conover patent issued on January 11, 1955 and has since been owned by Pfizer.

On the same day the patent issued, Pfizer commenced an action against Bristol, Squibb and Upjohn in the Northern District of Georgia. The charge was infringement of the Conover patent for tetracycline.

Bristol, Squibb and Upjohn then sued Pfizer in this Court for a declaratory judgment on the Conover patent and, over strong opposition from Pfizer, obtained transfer of Pfizer's action from the Northern District of Georgia to this Court (131 F.Supp. 21, 225 F.2d 718, 225 F.2d 720).

The litigation between Pfizer on the one hand and Bristol, Squibb and Upjohn on the other was settled on December 15, 1955. To a considerable extent this was due to the efforts made by Schwartz, president of Bristol. Licenses under the Conover patent for tetracycline were granted by Pfizer to Bristol, Squibb and Upjohn (with royalty to Pfizer).

B. THE CLAIMS IN THESE ACTIONS ARE BASED ON CHARGES BY THE FEDERAL TRADE COMMISSION AND IN AN INDICTMENT

It is without dispute that the claims in the complaints are substantially the same as charges made against the defendants by the Federal Trade Commission (the Commission) and in an indictment against three of the defendants handed up by a grand jury in this District on August 17, 1961. A review of these proceedings, and of an investigation by a Senate Subcommittee, will be useful as background.

C. PROCEEDINGS BY THE COMMISSION AND BY A SENATE SUBCOMMITTEE

1. Investigations by the Commission

In 1951, the Commission began an investigation of the pricing policies of Pfizer in selling "Terramycin", its trade name for an early broad spectrum antibiotic. Pfizer furnished extensive data. This lasted until 1955.

By resolution on July 22, 1953 (amended on July 13, 1956), the Commission initiated an investigation (15 U.S.C. §§ 46, 49) of "the * * * business, conduct, practices and management of corporations engaged in the production, sale or distribution of antibiotic drugs * * *". This investigation went on until 1958. The defendants and others responded to extensive data requests of the Commission. On the basis of these responses and other material and records, the Commission in June 1958 issued an "Economic Report on Antibiotics Manufacture"; this Report was of some 360 pages.

2. Investigation by a Senate Subcommittee

In 1959 and 1960, the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary investigated the ethical drug industry, which included the defendants here. Senator Kefauver was Chairman of the Subcommittee and Paul Rand Dixon was its Counsel and Staff Director. At the request of the Subcommittee, defendants furnished documentary material and other information. For six days in September 1960 there were public hearings before the Subcommittee, principally about antibiotics and about many of the matters involved in these actions. A report of the Subcommittee entitled "A Study of Administered Prices in the Drug Industry" (S.Rep. No. 448, 87th Cong., 1st Sess. 1961) was transmitted to the full Committee on May 8, 1961.

3. The Complaint of the Commission; Taking of Evidence

On July 28, 1958, the Commission issued a complaint charging the defendants with unfair methods of competition and unfair acts and practices in the sale of antibiotics, all in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

The charges made by the Commission in summary were these:

a. that Pfizer secured issuance of the Conover patent by fraud on the Patent Office and, aside from such fraud, secured issuance of the patent despite the fact that the invention was obvious and in public use before the Conover application was filed;

b. that by conspiracy all five defendants secured issuance to Pfizer of the Conover patent; that Pfizer made false representations to the Patent Office; that Pfizer, Bristol and Cyanamid withheld material information from the Patent Office; and that the other four defendants obtained licenses from Pfizer with knowledge of the fraud on the Patent Office and with knowledge that the invention was not patentable; and

c. that by conspiracy all five defendants fixed prices and, by keeping out competitors, monopolized antibiotics.

The defendants by October 15, 1958 had served their answers, denying the charges in the Commission's complaint.

Evidence was taken before Robert L. Piper, a Hearing Examiner, between January 1959 and February 1960. There was testimony by witnesses, apparently all in New York, on 86 days. The Commission called 13 witnesses; the defendants called 45 witnesses; and 3 witnesses (accountants) were considered as called by the Hearing Examiner. The testimony appears to have run to some 9,000 pages in the stenographic transcript. The documentary exhibits were massive in number and extent; they occupy at least 12 printed volumes and consist of some 8,000 pages.

The witnesses before the Hearing Examiner included the chief executives of each of the defendants: Malcolm of Cyanamid, McKeen of Pfizer, Schwartz of Bristol, Toohy of Squibb, and Gilmore of Upjohn. They each denied categorically that they were parties to any conspiracy or any other sort of price fixing agreement.

4. Initial Decision of Hearing Examiner

The Hearing Examiner filed an Initial Decision on October 3, 1961. This is a detailed document of about 270 printed pages. The Decision was completely in favor of defendants, exonerating them from any violation of the Federal Trade Commission Act and ordering that the complaint be dismissed.

5. Decision of Commission

The matter was then taken to the full Commission.

Meanwhile, in March 1961, Paul Rand Dixon had been named Chairman of the Commission; as already mentioned, he had been Counsel and Staff Director to the Senate Subcommittee which investigated the drug industry, including these five defendants, and made a report thereon.

The defendants moved that Chairman Dixon be disqualified. The Commission on December 20, 1961 denied the motion on the ground that disqualification was "for determination by the individual member concerned". Chairman Dixon declined to withdraw from participation in the proceeding.

The Commission (Dixon, Anderson, Elman, MacIntyre, Higginbotham) on August 8, 1963 filed its opinion, findings of fact and conclusions of law written by The Honorable A. Leon Higginbotham, Jr., then a Commissioner and now a United States District Judge for the Eastern District of Pennsylvania. The Commission issued orders on August 8 and December 17, 1963.

The opinion of the Commission disagrees in large part with that of the Hearing Examiner.

The Commission decision may be summarized as follows:

a. Pfizer by misrepresentations to and withholding information from the Patent Office prevented an accurate decision on the issuance of a patent on tetracycline on the Conover application;

b. the conduct of Cyanamid before the Patent Office was the same as that of Pfizer;

c. that it was not proven that a conspiracy existed between Pfizer and Cyanamid before the Patent Office, or any conspiracy among the five defendants to exclude others;

d. there was no misconduct before the Patent Office by Bristol, Squibb or Upjohn; and

e. the five defendants conspired to fix prices for tetracycline.

The final order of the Commission was that the five defendants cease and desist from any and all forms of price fixing agreements, that they each take specific steps in respect of independent pricing activities, that Pfizer grant to any applicant a license under the Conover patent for a royalty of not more than 2½% of net sales, and that Cyanamid grant to any applicant a license under the Duggar and Niedercorn patents for a royalty of not more than 2½% of net sales. See Note: Improperly Procured Patents: FTC Jurisdiction and Remedial Power, 77 Harv.L.Rev. 1505 (1964).

6. Decision of the Court of Appeals (363 F.2d 757)

The defendants obtained a review of the Commission's order by the Court of Appeals for the Sixth Circuit (15 U.S.C. § 45(c)).

The decision of the Court was handed down on June 16, 1966.

The Court first decided that the active part played by Chairman Dixon while counsel to the Senate Subcommittee caused him to form opinions as to facts which later became "inseparably a part of the ultimate findings of fact of the Commission" (363 F.2d at 765). The Court concluded that the participation of Chairman Dixon in the decision of the Commission was a denial of due process to the defendants, requiring that the decision be set aside and the matter remanded for a fresh consideration by

the Commission without any participation by Chairman Dixon.

The Court expressed no opinion whether there was substantial evidence to support the findings of the Commission that there was price fixing by defendants.

As to the issue of misconduct before the Patent Office, the Court expressed its opinion at some length.

The Court found that the fundamental question was whether coproduction (or inherent production) of tetracycline in the fermentation *broths* from which chlortetracycline (Aureomycin) had been recovered was material to the issuance of the Conover patent. There is a distinction between coproduction of tetracycline in the *broths* and the presence of tetracycline in the resultant *product* (Aureomycin). In this connection, the Court believed that there were many questions as to the actions and purposes of Patent Examiner Lidoff, who allowed the Conover patent, and was surprised that Lidoff, because of Patent Office policy and practice, had not been called as a witness. The Court saw no reason why Lidoff should not be required to testify and the Court framed about 12 specific questions for him. The Court found that, absent any testimony from Lidoff, the order of the Commission on the Patent Office misconduct issue was not supported by substantial evidence.

7. Initial Decision on Remand

On remand, it appeared that Mr. Piper was no longer employed by the Commission. The matter was referred to Abner J. Lipscomb, as Hearing Examiner, for taking the testimony of Lidoff and of any witnesses who had already testified on the issue of misconduct before the Patent Office.

There were hearings before Mr. Lipscomb in Washington on September 12 and 13, 1966. Lidoff was called for the Commission and testified; Hutz, a patent attorney for Pfizer, and Murphy, who did patent work for Pfizer, were called for Pfizer and testified.

The testimony of Lidoff in summary was that on November 24, 1954 he rejected the Conover product claims because he believed it probable that tetracycline had been produced along with chlortetracycline (Aureomycin) in the *broths* of the Duggar and Niedercorn processes; that thereafter he accepted the statements of tests by Pfizer that no identifiable tetracycline was produced in the Duggar-Niedercorn process; that had he known there was in fact such coproduction, the Conover patent would not have issued; that he was interested in whether there was coproduction in the *broths*, not whether tetracycline was present in the product Aureomycin; that he did not know tetracycline was present in the product Aureomycin; that had he known this, he would have rejected the Conover application on this ground, a different ground and one which related to prior public use rather than to disclosure in published patents (the basis on which he was interested in the Duggar-Niedercorn broth production).

The assignment to Hearing Examiner Lipscomb was solely for decision whether Pfizer and Cyanamid made misrepresentations, etc. to the Patent Office and thus caused Lidoff to allow a patent which otherwise would not have been allowed. Hearing Examiner Lipscomb accepted the testimony of Lidoff and adding this to the evidence already in the record found substantial evidence that there was misconduct by Pfizer and Cyanamid before the Patent Office as a result of which the Conover patent issued. The initial decision of the Hearing Examiner on remand was made on November 9, 1966.

8. Decision of the Commission on Remand

The matter then went to the Commission. Chairman Dixon did not participate. Since the time of the first decision, Commissioners Anderson and Higginbotham had been replaced by Commissioners Reilly and Jones. The four

Commissioners who decided the matter on remand were thus Elman, MacIntyre, Reilly and Jones.

The Commission on September 29, 1967 filed its opinion and on the same day issued its order.

As to the patent issue, the Commission found that the testimony of Lidoff supported the earlier findings and opinion of the Commission rather than those of the first Hearing Examiner, Mr. Piper. It was concluded that Pfizer and Cyanamid in substance were guilty of fraud on the Patent Office, as a result of which the Conover patent issued.

As to the price fixing issue, the four Commissioners were evenly divided. On the basis of new firms entering the field and of a decline in prices, Commissioners Elman and Reilly believed it was not necessary to decide the price fixing issue, which (in simple terms) was whether the earlier uniform prices were the result of conspiracy among the five defendants. Commissioners MacIntyre and Jones believed that the earlier findings and order as to price fixing should be adhered to and issued. There being no majority of the Commission in support of findings and an order as to price fixing, the complaint so far as it charged price fixing was dismissed.

The final order of the Commission dealt only with misconduct of Pfizer and Cyanamid before the Patent Office and as to this the final order was the same as the earlier order. No part of the order was directed against Bristol, Squibb or Upjohn; as to them the complaint was dismissed completely.

9. Second Decision of the Court of Appeals (401 F.2d 574)

Pfizer and Cyanamid obtained a review of the Commission's order by the Court of Appeals for the Sixth Circuit (15 U.S.C. § 45(c)).

The decision of the Court was handed down on September 30, 1968.

It was found that Lidoff had answered the material questions framed in the Court's first opinion and that this testimony supported the original findings of the Commission and contradicted the findings of Hearing Examiner Piper. The misconduct of Pfizer and Cyanamid was shown by substantial evidence and justified the compulsory licensing order of the Commission. The Court declined to pass on the credibility of Lidoff, saying that it would not "second-guess the Hearing Examiner and the Commission" (401 F.2d at 584). The order of the Commission was affirmed.

It may be noted that the Court did not decide whether the views of Lidoff as to patent law were correct or not. Lidoff testified that had he known what Pfizer and Cyanamid knew as to coproduction of tetracycline and as to its presence in Aureomycin, he would not have allowed the patent. As will be mentioned later, there may be some question whether this would be good patent law. Decisions such as Parke-Davis & Co. v. H. K. Mulford Co., 189 F. 95 (C.C. S.D.N.Y.1911), affirmed 196 F. 496 (2d Cir. 1912) raise difficult issues in this connection. The Court of Appeals for the Sixth Circuit stated that it "did not undertake to pass upon the validity of the [Conover] patent" (401 F.2d at 586).

10. Denial of Certiorari

The Supreme Court denied certiorari on March 24, 1969 (394 U.S. 920) and the Commission proceedings came to an end.

D. THE CRIMINAL PROCEEDINGS TO DATE

1. The Indictment; its Dismissal as to Individual Defendants

A grand jury in this District returned an indictment (61 Cr. 772) on August 17, 1961 naming as defendants Pfizer, Cyanamid, Bristol, McKeen (of Pfizer), Malcolm (of Cyanamid) and Schwartz (of Bristol). Squibb and Upjohn were named as co-conspirators.

The indictment charged in three counts a conspiracy in restraint of trade, a conspiracy to monopolize trade, and a monopoly of trade, in broad spectrum

antibiotics. It was charged that Sections 1 and 2 of the Sherman Act had been violated.

The indictment covered the same ground as that covered by the complaint of the Commission. It was charged that defendants, pursuant to a conspiracy, misled the Patent Office, used patents to exclude competitors, and fixed prices. All defendants pleaded not guilty.

After the return of the indictment, a grand jury in January 1962 was empanelled in the District of Columbia and investigated the conduct of a government official in transactions with drug firms, including these defendants. Under subpoena, McKeen, Malcolm and Schwartz testified before this Grand Jury (which returned no indictment). On motion of these individual defendants and over the Government's opposition, Judge Ryan, by order with opinion filed September 9, 1965, dismissed the indictment as to them (245 F.Supp. 801). The reason was that by testifying before the grand jury in the District of Columbia the individual defendants became immune from prosecution on the indictment in this District (15 U.S.C. §§ 32, 33).

2. The Criminal Trial

Trial of the indictment took place between November 23 and December 29, 1967 before Judge Frankel and a jury.

Nearly all the testimony offered by the government came from employees or former employees of the three defendants and the two alleged co-conspirators. The government called six witnesses from Pfizer, four from Cyanamid, three from Bristol, four from Upjohn, and one from Squibb; in addition, the government read the testimony in the Commission proceedings of Malcolm of Cyanamid (ill at time of trial) and Niedercorn of Cyanamid (who had died). The government called six witnesses who had not been connected with any defendant or alleged co-conspirator; these included Patent Examiner Lidoff. Most of the documentary evidence offered by the government came from the defendants or from alleged co-conspirators.

The defendants put in their case through the cross-examination of the government witnesses, most of whom were their employees or former employees.

In its bill of particulars, the government had stated that McKeen, Malcolm and Schwartz were responsible for the "pricing policy" of their respective companies. McKeen and Schwartz were called by the government and testified at trial and (as already noted) testimony of Malcolm was read by the government to the jury. They each categorically denied doing any of the acts charged in the indictment.

It was developed at trial that Parke Davis & Co. was a maker of broad spectrum antibiotics, was second in volume of sales of such antibiotics, followed the same prices and practices as the defendants on trial, and was concededly not a member of any conspiracy.

After the government rested on December 8, 1967, one witness was recalled by Pfizer for relatively short testimony concerning exhibits dealing with financial matters. This was the comptroller of Pfizer and after his testimony all defendants rested.

The case was submitted to the jury at 3:45 p. m. on December 28, 1967. The jury suspended its deliberation at 10:15 p. m. that night and resumed at 9:30 a. m. the following morning.

During its deliberation, the jury asked for and was given a copy of the Court's charge, the charts used by the government in summation, the charts showing the share of Parke Davis in the broad spectrum antibiotics market, and the evidence referred to in the Court's charge as to the dosages, prices and market techniques of Parke Davis.

The jury returned a verdict of guilty on all three counts as to each defendant on December 29, 1967 at 9:45 p. m.

3. Reversal of the Convictions

The judgment of conviction was appealed. The appeal was argued on May 7, 1969. The record on appeal fills 21 printed volumes, covering some 12,500 pages.

On April 16, 1970—after the hearing before this Court on the issue of approval of the proposed compromise—the Court of Appeals handed down its decision, reversing the judgments of conviction and directing a new trial. 426 F.2d 32. Judge Moore wrote the opinion; Judge Friendly concurred; Judge Hays dissented.

The reversal was for errors in the charge of the Court; whether the evidence was sufficient to support the conviction was not decided nor were any questions of patent law decided.

The Court noted that "the government's case, insofar as actual proof is concerned, rests almost entirely upon oral and written statements from defendants themselves. * * * the facts may be said to be virtually undisputed".

The Court placed great stress on the denials of the officers of the three defendants that any agreements as charged in the indictment were made at their meetings; the Court also stressed that the documents agreed to at the meetings showed nothing illegal. The Court stated that because conviction thus depended on the drawing of inferences by the jury contrary to this evidence, "the importance of instructions cannot be overemphasized".

The errors in the Court's charge were in summary as follows:

a. proper attention was not given to the "key issue", namely, the specific conspiracy charged, but the jury was permitted to infer conspiracy from the course of conduct shown by all the evidence;

b. the testimony of McKeen, Malcolm and Schwartz as to their meetings was "vital to any jury decision as to the existence of a conspiracy" but the testimony was "slighted and rather deprecated" in the charge;

c. by failing to explain that the Patent Office proceedings were only relevant to a consideration whether Pfizer and Cyanamid had agreed to exclude others at their November 1953 meetings, the charge "virtually diverted" the indictment "from an antitrust conspiracy case to a patent fraud case";

d. the jury's attention was "diverted" to an "inflammatory" issue, namely, whether there were "unreasonably high prices" (it is not clear whether this issue was considered irrelevant or whether it was felt to have been overemphasized in the charge);

e. the jury was improperly limited in considering the "all-important" evidence as to Parke Davis; there was no explanation of the significance of the Parke Davis evidence; and defendants were improperly restricted in argument from such evidence;

f. an "incorrect" interpretation was made of the November 1955 Bristol-Squibb-Upjohn agreements; these had no such "limitation on Squibb and Upjohn which barred them from manufacturing" as the Court charged; and

g. there should have been, but were not, "the clearest instructions that the jury should not consider Bristol's part in any of the events prior to December 14–15, 1955 as proof of Bristol's being in any conspiracy".

While Judge Hays voted to affirm and found the evidence for the government "sufficient" in the "perspective" of a "limited scope of review" he did note that such evidence was "not overwhelming".

E. COMMENCEMENT OF THE CIVIL ACTIONS

The first assertions of treble damage claims were by defendants filing counterclaims in patent infringement actions brought by Pfizer and Cyanamid.

The first infringement actions by Pfizer were against Bristol, Squibb, and Upjohn; these (to which reference has been made above) were brought on the

day the Conover patent issued and, as noted, were settled in December 1955.

Pfizer brought no other such actions until October 1960, but after that date and over the next five years Pfizer brought some 30 infringement actions on the Conover patent. A list of these actions is Appendix F to the first opinion of the Sixth Circuit (363 F.2d at 817).

One of these infringement actions was commenced by Pfizer on June 4, 1964 in this Court against the City of New York. On July 1, 1964, the City filed an answer containing a counterclaim against Pfizer and against Cyanamid, Bristol, Squibb and Upjohn as additional defendants. This counterclaim asserted a claim for treble damages for violation of the antitrust laws, based on the charges in the indictment. The counterclaim in substantial part is word for word copied from the indictment.

There may have been such a counterclaim earlier in infringement actions brought by Pfizer and by Cyanamid. The counterclaim by the City of New York on July 1, 1964 is the first of the similar claims in the actions now proposed to be settled.

In three patent infringement actions brought by Pfizer, treble damage antitrust counterclaims were filed by defendants respectively on September 30, 1965, on August 23, 1966 and on June 26, 1967. These referred to the Federal Trade Commission proceedings and to the indictment.

The first action commenced by a plaintiff asserting treble damage antitrust claims against defendants was that of the State of Texas commenced on August 4, 1967 in the Northern District of Texas. Counsel for Texas included some attorneys who were acting for the City of New York in the Pfizer infringement action; it was in this latter action that treble damage claims had been asserted on July 1, 1964 as a counterclaim. The complaint in the action by Texas asserted claims on behalf of a class consisting of the State and all cities and counties in the state which had purchased broad spectrum antibiotics.

In the same month, on August 27, 1967, a defendant in another Conover patent infringement action by Pfizer filed a counterclaim asserting treble damage antitrust claims.

On September 18, 1967, two actions asserting antibiotics antitrust claims were commenced in the Central District of California at Los Angeles. One was a class action on behalf of all retail drug stores and the other was a class action on behalf of all private hospitals.

At the time of the jury verdict on December 29, 1967, there were three actions by plaintiffs and five counterclaims by defendants in which treble damage antitrust claims were alleged on account of purchases of broad spectrum antibiotics.

After the verdict of the jury, something over 140 other and similar actions were commenced.

The claims made in these civil actions are the same as those made by the Commission and in the indictment.

A large number of the actions are brought as class actions under Rule 23 (b) (3) of the Federal Rules of Civil Procedure.

The plaintiffs in the actions may be divided into some separate categories, as follows:

a. government entities;

b. wholesale druggists and retail drug stores;

c. private hospitals, Blue Cross associations and the like;

d. purchasers of antibiotics for uses other than as medicine for human beings, for example, animal feed, animal medication and the like; and

e. all others (a miscellaneous group).

It may be useful to describe more fully the actions by government entities.

Each state, Puerto Rico and the District of Columbia has commenced a sepa-

rate action, except for Delaware and Nevada.

Delaware is an intervenor plaintiff in an action commenced by City of Philadelphia and City of Detroit in the Eastern District of Pennsylvania (68 Civ. 144 there) and transferred here (68 Civ. 4298 here).

Nevada has not commenced an action nor has it intervened in any action.

In addition to actions commenced by states, a number of cities and counties have commenced their own actions against defendants. These are as follows (file numbers are those in this Court):

Baltimore	(68 Civ. 4325)
Boston	(68 Civ. 4354)
Chicago	(69 Civ. 901)
Denver	(68 Civ. 4930)
Kansas City, Missouri	(69 Civ. 2861)
Los Angeles County	(68 Civ. 4341)
Memphis	(68 Civ. 1807)
Nashville and Davidson County	(69 Civ. 899)
New York City	(64 Civ. 1742; counterclaim)
Philadelphia and Detroit	(68 Civ. 4298)
San Francisco County and City	(68 Civ. 4274)

There are a number of government entities which are intervenor plaintiffs in the action of City of Philadelphia and City of Detroit. Delaware has already been mentioned. The following cities are intervenor plaintiffs in that action:

Akron	Lansing
Buffalo	Madison Heights
Cleveland	Pittsburgh
Dearborn	Santa Clara
Honolulu	Tampa

The following counties are intervenor plaintiffs in that action:

Allegheny (Pa.)
Erie (New York)
Honolulu (Hawaii)
Summit (Ohio)

The following other government entities are intervenor plaintiffs in that action:

Township of Redford (Mich.)
Board of Education of the Black Horse Pike Regional School District (N.J.)

(The City of Flint, Michigan, was an intervenor plaintiff in that action but has indicated that it prefers to participate in the settlement as a member of a class represented by the State of Michigan in its action (69 Civ. 898 here).)

F. THE OFFER OF SETTLEMENT MADE BY DEFENDANTS

Under date of February 6, 1969 (later modified under date of May 9, 1969) the defendants made a written offer of $100,000,000 in settlement of *all* of the following claims:

"A. Claims of states, counties, cities and their political subdivisions and agencies and any other governmental entities (excluding the Federal Government), arising out of their purchases or out of payments to or for the benefit of recipients of welfare or other aid;

"B. Claims of wholesalers, retailers and individual consumers arising out of their purchases, including claims of states as parens patriae on behalf of

their citizens or on behalf of classes including the state as a consumer and all other consumers in the state."

It will be seen that this offer is addressed to claims asserted by government entities (A. above) and by wholesale druggists, retail drug stores and "individual consumers" (B. above).

(At the same time, as already noted, defendants offered a sum in settlement of all claims of private hospitals and like claims; that offer is separate, not involved in the present application, and will not be referred to again.)

The offer of settlement of February 6, 1969 (modified May 9, 1969) was contained in a printed document which set out the general procedural steps contemplated; this document will be sometimes referred to as the "settlement plan".

(A paper dated December 4, 1969 and signed by counsel to defendants was handed at some point to the Court. This paper changes the date "February 6, 1972" in line 17 of page 3 of the settlement plan to "December 31, 1972".)

The procedure set out in the settlement plan was, in brief, that appropriate actions would be determined to be maintained as class actions; that the required (Fed.R.Civ.P. 23(c) (2)) notices with option to be excluded from the class would be directed to all class members; that if exclusions were "substantial and material" defendants could withdraw; that if defendants should go forward with the settlement, the $100,000,000 settlement figure would be reduced appropriately to reflect the exclusions from class membership; that any plaintiff accepting the settlement could present to the Court a Proposed Plan for the allocation of the global settlement amount; that if all plaintiffs did not agree on a common Plan, then defendants might elect to proceed with any Proposed Plan or modification thereof; that the proposed compromise embodied in the agreed common Plan or the Plan elected by defendants would be submitted to the Court for approval under Rule 23(e) of the Federal Rules of Civil Procedure; that administrative and other costs incurred in the settlement procedure should be paid from the settlement amount; and that if the settlement were approved, all claims covered thereby would be "satisfied or otherwise terminated".

G. COURT PROCEEDINGS ON THE PROPOSED COMPROMISE

1. The May 26, 1969 Order

The offer of settlement having been accepted in principle by nearly all the plaintiffs to which it was addressed, an order was filed on May 26, 1969 which began the administration contemplated by the offered settlement. This order was made after notice to counsel for all parties affected and after a hearing.

The order treated the settling plaintiffs in two groups: (1) the states, Puerto Rico and the District of Columbia (often referred to collectively as "the states"); and (2) wholesalers and retailers.

As to the group (1) plaintiffs, the May 26, 1969 order provided a "temporary national class action" (West Virginia v. Pfizer, 68 Civ. 240 in this Court) from which any of the plaintiff states *not* accepting the offer of settlement could by notice exclude themselves. Alternatively, any state (as defined in the order) which on or before June 10, 1969 filed with the Clerk of this Court a statement in writing that it accepted the offer of settlement but did not wish to become a member of the "temporary national class" could maintain its action as a class action and become an accepting state without having been included in the "temporary national class". A number of states accepted the offer of settlement under this alternative procedure. It was provided that as to the states accepting the offer of settlement, each action commenced by them was to be maintained as a class action (Fed.R. Civ.P. 23(c) (1)) for two classes, described in detail in the order but in summary as follows: (a) state, county, and city hospitals and other institutions; and (b) individual members of the con-

suming public who bought antibiotics in the state.

The May 26, 1969 order provided that city and county government entities which as plaintiff or intervenor plaintiff had pleaded by June 10, 1969 a class claim on behalf of consumers resident within their territorial limits could maintain a class action as proper representatives of the class.

As to the group (2) plaintiffs, the May 26, 1969 order provided that those actions commenced by wholesale druggists and retail drug stores which had accepted the offer of settlement were consolidated as the "consolidated wholesaler-retailer class action". The actions so consolidated were listed in the order; as to them the caption usually employed is that of Alpine Pharmacy, Inc. (69 Civ. 559 here), the first in alphabetical order. It was determined that the consolidated action was to be maintained as a class action. The members of the class were specified to be all purchasers of broad spectrum antibiotics in any of the states who bought "for resale at wholesale or retail". The order provided that the plaintiffs and class members in the consolidated action were to be represented by a committee of counsel comprised of all counsel then of record in the actions consolidated.

The May 26, 1969 order stated that the class action determinations and the classes established were for the purpose of administering the proposed settlement.

2. Acceptances of Settlement Offer by Government Entities

The May 26, 1969 order was directed to the states as notice to members of the "temporary national class" (Fed. R.Civ.P. 23(c) (2)) and copies of the order were sent to each member of the class.

All the states accepted the offer of settlement except California, Hawaii, Kansas, North Carolina, Oregon, Utah and Washington.

It will be remembered that Nevada did not commence an action nor intervene in an action. Nevada accepted the settlement offer, however, because it did not elect to be excluded from the "temporary national class" after service on it of the May 26, 1969 order. For purposes of administration of the settlement offer, Nevada, its institutions and consumers, are members of classes represented in the class action, West Virginia v. Pfizer (68 Civ. 240 here).

All the other government entities accepted the settlement offer except Kansas City (Missouri) which excluded itself from the settlement by notice filed June 10, 1969.

3. Notices Under Rule 23(c) (2)

Having determined that certain actions were to be maintained as class actions, it was then necessary to direct to members of the classes the notice required by Rule 23(c) (2).

The May 26, 1969 order had instructed the class representatives to submit drafts of notices. The Court then prepared the notices and, by orders filed June 16, 1969 (and in a few actions modified by later orders), these were directed to be sent out.

As to the class actions by government entities, two orders were filed in each such action in which two classes, institutions and consumers, were represented and one order was filed in each such action in which one class, consumers, was represented.

The order as to institutional class members directed notice by first class mail on or before June 26, 1969 to all government entities and institutions within the state. The mailing list of class members was to be supplied by the parties, usually the class representative. The notice described the situation generally and included a copy of the settlement plan. The class members were given until August 1, 1969 to exclude themselves from the class.

The order as to consumer class members directed that notice be given by publication of the prescribed form of notice on or about July 1, 1969 in every daily English and Spanish language

newspaper of general circulation in the state. The consumer class members were given until August 1, 1969 to exclude themselves from the class. They were also notified that if they wished to make a claim in the settlement they were required to file by August 16, 1969 a verified statement or a statement certified by the supplier. The notice to consumers also contained this statement: "If you do not make an individual claim by August 16, 1969, that will constitute an authorization to the Attorney General [in the District of Columbia and in some other government entities the chief law officer was referred to by a different title] to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct."

As to the consolidated wholesaler-retailer class action, one order as to notice was filed on June 16, 1969 and modified in one respect by order filed June 18, 1969. Notice in the prescribed form was directed to be given by first class mail on or before June 19, 1969. The names and addresses of the class members were to be obtained by using the mailing list of Clark-O'Neill, Inc., 1 Broad Avenue, Fairview, New Jersey 07022, a business engaged in maintaining a mailing list of wholesale drug houses and retail drug stores in the United States. The wholesaler-retailer class members were given until August 1, 1969 to exclude themselves from the class. They were also given until August 16, 1969 to file a claim in the settlement; a claim form to be verified was annexed to the notice.

The notices were duly given as provided in the orders. The notices were in all instances signed by the Clerk and those sent by mail were sent in penalty envelopes with the Clerk's return address. All notices of exclusion and all claims were required to be addressed to the Clerk. Counsel for the parties, Clark-O'Neill, Inc. and an advertising agency assisted the Clerk. Defendants were directed in the orders to advance the necessary funds (the newspaper notices cost about $130,000), to be reimbursed as an expense of the settlement if the settlement proposed were finally approved by the Court.

4. Problems in California

As noted above, the State of California chose to reject the offer of settlement. At the time of the Rule 23(c)(2) notices, Los Angeles County and San Francisco County had chosen to accept the offer of settlement; so also had the City of Santa Clara, California, an intervenor plaintiff in the City of Philadelphia and City of Detroit action.

Out of this situation arose the issue whether within a state rejecting the settlement offer, a smaller political subdivision (county or city) having its own action against defendants could maintain such action as a class action and accept the offer of settlement. The State of California protested that it could not be done.

Los Angeles County, wishing to accept the settlement, sought to amend its complaint so as to allege claims on behalf of consumers within its geographical limits. California opposed. This Court ruled that within a rejecting state a county, but not a city, could maintain a class action independent of the state. By order filed June 18, 1969, the amendment sought by Los Angeles was allowed and a determination made that Los Angeles could maintain its action as a class action. By separate order filed the same date, Rule 23(c)(2) notice was directed to be given to the consumer class represented by Los Angeles County by publication in newspapers there. A stay sought by California was denied, as well as a statement under 28 U.S.C. § 1292(b).

San Francisco (a county as well as a city), wishing to accept the settlement, had, by order on a stipulation filed April 29, 1969, amended its complaint to assert claims on behalf of consumers within its geographical limits. By order filed June 19, 1969, it was determined that the action of San Francisco could be maintained as a class action. By separate order filed the same date,

Rule 23(c) (2) notice was directed to be given to the consumer class represented by San Francisco by publication in newspapers there.

California applied to the Court of Appeals for a stay pending an application for an extraordinary writ. The Court of Appeals denied a stay on June 25, 1969 (California v. Wyatt, MR-3097; (Hays, Feinberg, CJJ., Jameson, D.J.). Mr. Justice Harlan thereafter denied a stay.

The principle of the ruling (as stated above) dictated that Santa Clara, a city and not a county, should not maintain a class action on behalf of consumers within its geographical limits. By order filed June 19, 1969, it was so provided and no Rule 23(c) (2) notice was given to any consumers within the geographic limits of Santa Clara.

5. Responses to the Rule 23(c) (2) Notices

Notices of exclusion were filed by 61 members of the classes consisting of government entities and institutions.

Notices of exclusion were filed by 42 members of the classes consisting of individual purchasers of antibiotics.

Notices of exclusion were filed by about 1500 members of the class consisting of wholesalers and retailers. In connection with the number of exclusions from this class, it may be noted that under date of June 27, 1969 the Executive Director of the American Pharmaceutical Association wrote about the settlement offer to executives of state pharmaceutical associations. Among other things, this letter stated that American Pharmaceutical Association "has urged pharmacists not to submit claims against the settlement funds unless actual damage can be demonstrated * * *" and further that "adverse public reaction could well result if pharmacists obtain a share of the settlement funds and do not pass amounts received on to patients".

Claims were filed by about 88,000 members of the classes consisting of individual purchasers of antibiotics. The face amount of the purchases made by these claimants is something in excess of $16,500,000.

Claims were filed by somewhat more than 4100 members of the class consisting of wholesalers and retailers. The face amount of the purchases made by these claimants is in excess of $345,000,000.

6. Proposed Plans of Allocation

The defendants did not elect to withdraw from the settlement by reason of the exclusions from the various classes. They were given such withdrawal right by paragraph III.B of the settlement plan. They elected to go forward with the settlement.

The settlement plan provided that any plaintiff accepting the settlement could file by a date determined by a formula (September 2, 1969, it appears) a "Proposed Plan for the Allocation of the Fund". The allocation is of importance, of course, because the offer of defendants was of an unallocated total sum for all plaintiffs and all classes.

Proposed Plans of Allocation were filed as follows:

a. by counsel for the State of Alabama and for 29 other states, Puerto Rico, the District of Columbia, Chicago, New York City, Memphis and Nashville (the "Alabama Plan");

b. by counsel for the State of Connecticut and for 5 other states, Baltimore, and Denver;

c. by counsel for Los Angeles County;

d. by counsel for the City of Philadelphia and City of Detroit and for intervenor plaintiffs in that action, including the State of Delaware;

e. by counsel for the County and City of San Francisco;

f. by the committee of counsel in the consolidated wholesaler-retailer class action; and

g. by counsel for the State of Vermont

7. The Alabama Plan

This plan will be described in some detail because, with modifications, it

was later adopted by defendants and moreover was the most comprehensive of the plans filed.

The Alabama Plan divided the $100,000,000 sum offered between all the claims asserted in all the relevant actions, even though some plaintiffs had rejected the settlement offer. The division having thus been made, the Plan affords a basis for reducing the $100,000,000 amount to reflect the claims represented by plaintiffs rejecting the settlement offer. Provision for such reduction was made in paragraph III.D of the settlement plan.

The theory of the Alabama Plan is that claims of government entities on account of institutional purchases and welfare reimbursements are entitled to first priority on the settlement fund. The reasoning is that the dollar amount of these purchases and payments can be calculated with reasonable accuracy and the damages, on the assumption of liability, are direct and provable. The dollar amount of purchases by individual consumers unreimbursed (that is, not welfare patients) are not so easily calculated and as to claims of wholesalers and retailers these may be affected, among other things, by the "pass-on" defense.

The allocation for institutional purchases starts with the dollar amount of sales of antibiotics to government entity institutions, wholesalers and retailers for the period believed by the proponents to be relevant. Sales information was supplied by defendants. Some part of the sales to wholesalers and retailers were actually sales through them to government entity institutions as "drop-shipments" by defendants with a handling allowance to the wholesalers or retailers concerned. After adjustment for these sales, it was determined that the dollar amount of sales to government entity institutions was $121,620,000.

It was then assumed that, absent the claimed antitrust law violations, competitive prices would have been much lower; it was calculated that the prices actually charged contained an overcharge of 66⅔%. Allowing for uncertainties in law and in fact, it was concluded that for settlement purposes an overcharge figure of 40%–41% could properly be used. This figure is said to have been used in negotiations which preceded the $100,000,000 offer by defendants. Applying a 41% overcharge figure to the sales figure of $121,620,000 yielded a figure of $49,864,200 or, rounded off, $50,000,000.

During what was felt to be the relevant period, many states, counties and cities had public assistance (welfare) programs under which eligible persons having prescriptions for antibiotics could obtain these from drug stores which in turn would be reimbursed by the public authorities.

It was calculated that $48,600,000 was spent by states, counties and cities as reimbursement to vendors for antibiotics delivered to welfare patients. This calculation was based on information from the Department of Health, Education and Welfare that $900,000,000 had been paid (in the period believed to be relevant) as public assistance for drugs of all kinds. As a result of special studies and of earlier surveys in several localities, it was concluded that about 5.4% or $48,600,000, of the $900,000,000 represented vendor reimbursement for antibiotics. The federal government paid about 50% of the public assistance programs. The proponents believed that claims on account of the 50% public assistance paid by the federal government were not covered by the settlement offer (whether this be true or not need not be, and is not, determined). For allocation purposes, the share paid by states, counties, and cities was used, that is, 50% of $48,600,000, or $24,300,000.

It was then assumed that, absent the claimed antitrust law violations, competitive prices by defendants to vendors (retail drug stores, mainly) would have been lower and reimbursement payment would have been much lower; it was then calculated, but by a different method from that employed for institutional purchases, that the vendor reim-

bursement sum of $24,300,000 contained an overcharge of 66⅔%; applying the same overcharge figure for settlement purposes of 41% to the vendor reimbursement sum of $24,300,000 resulted in a settlement figure of $9,963,000 or, rounded off, $10,000,000.

The allocation therefore was $60,000,000 to government entities—of which $50,000,000 was for institutional purchases and $10,000,000 for vendor reimbursement.

The allocation of $60,000,000 to government entity claims left $40,000,000 to be divided between (a) claims of wholesalers and retailers and (b) claims of individual unreimbursed purchasers (consumers).

The amount to be allocated to claims of wholesalers-retailers was first determined. The proponents felt that in principle nothing should be allocated to these claims because the members of this class sold nearly all their antibiotics to consumers and passed on any and all overcharge. (This problem was considered in a different context in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968).) It was also taken into consideration by the proponents that the offer of defendants contemplated and the Alabama Plan provided for, payments in settlement to individual purchasers (consumers). The proponents felt that members of the wholesaler-retailer class actually made *more* profits as a result of the assumed violations of law. However, in order to secure the agreement of the wholesaler-retailer class to the settlement, a "nuisance value" allocation of $3,000,000 (a somewhat arbitrary figure) was made to this class.

This left $37,000,000 for the claims of individual purchasers (consumers). It will be remembered that some 38,000 consumers filed claims having a face amount of something in excess of $16,500,000. In this connection, the Alabama Plan (pp. 24, 25) makes these statements:

> "As of midnight August 16, 1969, some 38,000 individual consumers filed claims in accordance with this Court's July 1, notice. This is the first time that individual consumers—those who actually paid the overcharge caused by a defendant's antitrust violations—will participate in an antitrust setlement. The $37,000,000 fund will provide a basis for payment of all individual consumer claims and will also provide a surplus from which the indirect benefit contemplated by this Court's July 1 notice may be conferred upon consumers as a whole.
>
> * * * * * *
>
> "After payments to individual consumers who have filed claims in accordance with the Court's notice are deducted from each entity's consumer fund, the balance, if any, should be held for distribution in accordance with each entity's internal, or second-stage allocation plan. Most entities joining in this allocation plan will seek court approval in their second-stage allocation plans for an additional period of time within which individual consumers may be permitted to file claims. Others may seek court approval to use the balance of their consumer fund for a public health purpose. This Court has the power, and, of course, should exercise its equitable control over these funds for the benefit of all consumers."

The Alabama Plan, to recapitulate to this point, divided the $100,000,000 as follows:

Government entity claims	
institutional purchases	50,000,000
vendor reimbursement programs	10,000,000
Individual purchaser claims	37,000,000
Wholesaler-retailer claims	3,000,000
	$100,000,000

The next problem in the allocation was to divide the $50,000,000 fund for institutional purchases between the various government entity plaintiffs acting as class representatives. This was done by use of the number of hospital beds in institutions of, or represented by, each such plaintiff, applied as a percentage of the total number of hospital beds in the United States and Puerto Rico. Figures on hospital beds were taken from the American Hospital Association Guide for the years 1955, 1961 and 1967 (as to certain hospital beds in Puerto Rico, figures were taken from the Puerto Rico Hospital Registry, as being more complete). The percentage figure was then obtained for each of the years 1955, 1961 and 1967; the average of these three percentages was used in making the division of the $50,000,000 amount.

A similar problem was the division between government entity plaintiffs in respect of the $10,000,000 vendor reimbursement fund. Some states had no such public assistance programs and thus were excluded from any share of this fund. In dividing the $10,000,000 amount between the states having public assistance vendor reimbursement programs, the basic information was obtained from a yearly publication "Source of Funds Expended for Public Assistance Programs" published by the Department of Health, Education and Welfare, Social Security Administration, Bureau of Public Assistance, Division of Program Statistics and Analysis. This information showed for each state the dollar amount of vendor reimbursement for drugs supplied for each year under public assistance programs, broken down (after 1959) by type of program (that is, Old Age Assistance, Aid to Families with Dependent Children and the like). The special studies and earlier surveys, to which reference has been made, indicated for each type of program the percentage of all drugs attributable to antibiotics. By use of these percentages it could be calculated how much each state spent for antibiotics under vendor reimbursement programs (where no breakdown by program was available, as in 1959, a slightly different method had to be used). It was then determined what percentages these amounts were of the total amount spent by all states for antibiotics under vendor reimbursement programs. These percentages were then applied to the $10,000,000 amount to determine the share of each state in that amount.

The $37,000,000 which had been allocated to claims of individual purchasers (consumers) had to be divided into the amount applicable to each class of consumers represented by each government entity plaintiff. This division was made on the basis of the percentage of the total population (including Puerto Rico) represented by the population of each government entity plaintiff. For this purpose, the 1960 census was employed.

Before establishing the final division of the $50,000,000 fund for institutional purchases, an adjustment was made for certain institutions which had elected to exclude themselves from the class represented but the beds of which had been included in the data on which a tentative division had been made.

No adjustment was made for wholesaler-retailer or for consumer class members who had elected to exclude themselves from their respective classes.

As already noted, the Alabama Plan allocated $3,000,000 to the claims of the wholesaler-retailer class.

The final allocations of the Alabama Plan for each government entity plaintiff for (A) institutional purchases, (B) vendor reimbursement programs, and (C) consumers are shown on Exhibit "E" to that Plan. The total is not $97,000,000 but $82,615,030. This is because the offered settlement amount had to be reduced under the settlement plan so as to reflect those government entity plaintiffs who rejected the settlement. This was done by simply excluding the amounts allocated to them of the $100,000,000 total settlement amount. (Doubtless by oversight Kansas City, Missouri was not taken into account as

a separate government entity plaintiff in any of the divisions of the Alabama Plan and no adjustment was made for Kansas City as a plaintiff rejecting the settlement.)

The Alabama Plan, it will be noted, allocates only to *classes* represented by each plaintiff class representative accepting the proposed compromise. Approval of the proposed compromise and dismissal of the actions as far as claims against defendants are concerned will not end the responsibility of the Court and of the class representative plaintiffs. Further plans of allocation to each member of the classes and plans of distribution must be prepared and approved by the Court.

8. The Other Proposed Plans of Allocation

The Plan of Allocation filed by the committee of counsel in the consolidated wholesaler-retailer class action allocated $40,000,000 to the claims of wholesalers and retailers.

The other Plans of Allocation (except that of San Francisco which adopted the allocations of the Alabama Plan) did not allocate anything to the claims of wholesalers and retailers. It was said that anything given to wholesalers and retailers would be a "windfall" to them. Some of the other Plans also differed with the Alabama Plan in that all amounts allocated to government entity plaintiffs and institutions and to consumers were divided on the basis of population, without any special allocation for vendor reimbursement welfare programs.

9. Dispute Over Allocation to Wholesaler-Retailer Class; Result of Negotiations

The settlement plan provided (paragraph III.E(1)) that the parties would use their best efforts to agree upon a common Plan of Allocation of the settlement amount; that failing such agreement, defendants could "elect to proceed with any proposed Plan or modification thereof"; but that if the allocation to any government entity plaintiff under a Plan elected by defendants should be less than under a Plan proposed by that plaintiff, then that plaintiff might "withdraw from the settlement". No similar right to withdraw from the settlement was provided in the settlement plan for the wholesalers and retailers.

A very serious issue was the amount to be allocated to the wholesaler-retailer class. The Plan submitted on behalf of that class, it will be remembered, allocated $40,000,000 to wholesalers and retailers, while the Alabama and San Francisco Plans allocated $3,000,000 and the other Plans nothing at all to that class. An increase in any allocation to the wholesaler-retailer class would have resulted in a decrease by that amount in the allocation to government entity plaintiffs. It was stated for the government entity plaintiffs that they would exercise their right to withdraw from the settlement were the wholesaler-retailer allocation increased at their expense. Counsel for the wholesaler-retailer class, on the other hand, indicated that they considered a $3,000,000 allocation insufficient and that they would oppose approval by the Court of any Plan elected by defendants which provided an allocation to wholesalers and retailers of no more than that amount.

After intensive negotiations, of which the Court was kept generally informed, the issue was decided in a manner acceptable to the government entity plaintiffs and nearly all of the committee of counsel for the wholesaler-retailer class. In summary, defendants agreed to deposit the settlement amount forthwith in an escrow account; the interest on the amount in escrow would accrue for the benefit of the wholesaler-retailer class, thus increasing by an amount exceeding $8,000,000 the $3,000,000 proposed for that class by allocation in the Alabama Plan.

During the negotiations to agree upon a common Plan, the State of Vermont withdrew its Plan and adopted the Alabama Plan. Agreement was reached among counsel for the government entity

plaintiffs that they would abide by the decision of the Court as to the fairness of any Plan among those submitted by government entity plaintiffs which the defendants might elect.

10. Election by Defendants

On October 20, 1969, defendants filed a document, "Election by Defendants to Proceed With a Modified Plan of Allocation". This Election accepts the Alabama Plan in large part but has certain modifications. The chief of these modifications will be mentioned:

a. the Election accepts the aggregate amounts allocated to each government entity plaintiff for all the classes represented but defendants take no position on the division of this aggregate amount by the Alabama Plan into the three separate parts;

b. the Alabama Plan, as noted, failed to take into account the withdrawal from the settlement of Kansas City; a reduction in the settlement amount is made by defendants on account of Kansas City;

c. the Election takes the position that defendants are settling all claims of government entity plaintiffs "for welfare, including any amounts reimbursed by the Federal Government"; this refers to the treatment in the Alabama Plan, as already noted, of payment by the federal government of 50% of public assistance programs; and

d. the Election includes provision for the deposit by defendants of an escrow fund and explains that this is done so that interest on the escrow fund may be for the benefit of the wholesaler-retailer class, which had found unacceptable the allocation to it in the Alabama Plan.

The amount which defendants undertook in the Election to deposit in escrow for the settlement of all claims asserted in these settling actions was $85,341,215. The comparable figure in the Alabama Plan was $85,615,030 ($82,615,030 from Exhibit "E", page 5, plus $3,000,000 for the wholesaler-retailer class from page 24.)

The $85,615,030 figure from the Alabama Plan had to be reduced by $118,560 to reflect rejection of the settlement by Kansas City. The figure $118,560 for Kansas City was calculated by the hospital bed formula of the Alabama Plan. Reduction by this amount left a figure of $85,496,470.

The settlement plan provided that administrative and other costs of settlement should be paid "from the Fund". An amount of $152,801.29 for past such expenses paid by defendants and an amount of $27,454 for future estimated such expenses were deducted from the settlement amount. The total of the two deductions was $180,255.29 and after such deductions the settlement amount was $85,316,214.71.

A final adjustment of this amount by the addition of $25,000 was made. This $25,000 was added to the amount to be available for the wholesaler-retailer class and was the result of a special negotiation between certain of the counsel for some of the interested parties. The addition of the $25,000 carried the settlement amount to $85,341,214.71, rounded off to $85,341,215.

The calculation of the settlement amount is explained in some detail in a footnote on pages 3–4 of defendants' "Election".

Of the escrow amount of $85,341,215, the amount for the wholesaler-retailer class was $3,013,939 and the amount for classes represented by government entity plaintiffs was $82,327,276.

11. The Escrow Order and Agreement

On the day defendants filed their Election, October 20, 1969, the Court filed an order approving the Escrow Agreement and directing defendants to deposit $85,341,215 with the Escrow Agent. This has been done.

The Escrow Agreement is dated October 20, 1969 and is between the five defendants and The Chase Manhattan

Bank as Escrow Agent. A brief reference will be made to some of its principal provisions:

(a) the escrow fund is to be invested "to obtain the best interest yields consistent with safety", etc.;

(b) if there is a final order approving the proposed compromise by November 23, 1970, then on that date the escrow fund shall be divided into two separate such funds, one of $82,327,276 for classes represented by government entity plaintiffs and the other of the balance of the escrow fund for the wholesaler-retailer class;

(c) if there is no final order by November 23, 1970, then the division into two separate funds will take place on December 23, 1970. The effect is thus to give the wholesaler-retailer class the benefit of an additional month's interest on the entire escrow fund;

(d) after division into separate funds, interest on each fund accrues for the benefit of that fund; and

(e) when, as and if there is a final order approving the settlement, the separate funds will be paid over by the Escrow Agent for distribution to class members as directed in orders of the Court.

12. Withdrawal of Los Angeles and San Francisco; Addendum to Election of Defendants

For reasons as to which one may only speculate, Los Angeles County and San Francisco County decided to withdraw from the settlement; on December 15, 1969 they filed notices of withdrawal. They purported to exercise the right of withdrawal provided in paragraph III.-E.(1) of the settlement plan and defendants have not contested their withdrawal.

The Election of defendants filed October 20, 1969 had provided for $2,313,645 for claims in the Los Angeles action and $425,825 for claims in the San Francisco action. These aggregate $2,739,470.

On January 20, 1970, defendants filed a document, "Addendum to Election by Defendants to Proceed With a Modified Plan of Allocation". This document contained a proposal by defendants that the settlement amount of $85,341,215 be reduced by $2,739,470 for the Los Angeles and San Francisco withdrawals. This would mean that $82,601,745 of the principal escrow amount of $85,341,215 is being held as the principal amount in escrow for settlement of all claims in these actions.

It may be noted that in response to newspaper notices published in Los Angeles and San Francisco, 541 claims were filed by consumers resident in Los Angeles and these had a face amount of $249,996; there were 132 such claims filed by residents of San Francisco and these had a face amount of $37,418.

13. Notices Under Rule 23(e)

At the request of counsel for 31 government entity plaintiffs which had accepted the proposed compromise, an order was made and filed on November 18, 1969 requiring all parties to the 66 settling actions to show cause on December 5, 1969 why notice should not be sent to all class representatives and class members, in form as annexed to the order. The proposed forms of notices were of a hearing to consider whether the proposed compromise should be approved by the Court (Fed.R.Civ.P. 23 (e)).

The return of the order to show cause was postponed to December 15, 1969. On that date, all interested parties were heard. While there was no agreement on the forms of notices, all parties in all actions agreed that notices should be sent out and a hearing held on whether to approve the proposed compromise. (An attorney for certain members of the wholesaler-retailer class (not plaintiffs in any action) objected to any notices or any hearing until it had been determined what amounts would be received in settlement by each member of that class.)

There was further discussion of the forms of notices at hearings held on January 13, 19 and 29, 1970. On January 27, 1970, forms of notices to class members as redrafted by the Court were sent to all counsel who had attended the hearing on December 15, 1969. An explanatory memorandum was also sent and notice was given that the redrafts would be discussed with counsel on February 2, 1970.

The discussion of the forms of notice took place on February 2, 1970, as advised in the explanatory memorandum sent out as stated above.

By an order filed February 4, 1970, the Clerk was directed to mail (by February 24, 1970) a copy of a notice (in the form annexed to the order) to all members of the consumer classes in each of the actions brought by a government entity who had filed claims with the Clerk in response to the notices published on or about July 1, 1969; by the same order the Clerk was directed to arrange for publication of a notice to consumers (in the form annexed to the order) in every newspaper of general circulation (English and Spanish) in each of the government entities accepting the proposed compromise. This newspaper publication is as extensive as that in July 1969. The defendants were anxious that there be such widespread publication; it did not seem, however, that the settlement fund should be burdened with the expense of so extensive a publication. The order provided, therefore, that the publishing costs, to be advanced by defendants, would be reimbursed only to the extent of the cost of publishing in the two newspapers of largest circulation within the territory of each government entity.

By an order filed February 4, 1970, the Clerk was directed to mail (by February 24, 1970) a copy of a notice (in the form annexed to the order) to each member of the wholesaler-retailer class as more specifically described in the order.

By orders filed February 6, 1970 in each of the actions by a government entity in which a class of government institutions is represented, the Clerk was directed to mail (by February 24, 1970) a copy of a notice (in the form annexed to the order) to the chief law officer of each plaintiff, to each county, city or other government entity within the plaintiff, and to each hospital district, hospital and other institution—all as more specifically provided for in the respective orders.

All of the notices advised that a hearing on the proposed compromise would be held on March 24, 1970.

It may be noted that each settling action is separate and is the subject of a separate compromise by payment of a separate amount in compromise; the offer of defendants is such, however, that unless there is a settlement of all of these 66 actions there can be no settlement of any of them. For this reason, as well as for convenience and economy, the hearing was designed to include all actions.

The published newspaper notices to consumers were made shorter than the other notices. This was because such notices were primarily directed to members of the consumer class who had not filed claims and whose interest in the hearing might fairly be regarded as minimal. Expense was also a consideration. Among other things, the newspaper notices advised of the time, place and purposes of the hearing; gave a general description of the actions; advised in what documents on file the details of the proposed compromise could be found; noted that the amount proposed to be paid by defendants in each of the actions "must be divided with the Court's approval among all the claims represented in the actions including those of individual consumers"; and stated that these amounts were subject to reduction for administrative expenses and also "for fees and expenses (as later allowed by the Court) of counsel for plaintiffs in the actions". The published newspaper notices also contained this statement:

"According to notices already given with the Court's approval, each state

and other governmental entity participating in the settlement is authorized to use for the benefit of its citizens in such manner as directed by the Court whatever money is recovered on account of claims of consumers represented in its action who failed to file an individual claim by August 16, 1969."

The notices sent by mail to consumers who had filed claims and to all members of other classes were in more detail.

The notices sent by mail to consumers contained this statement:

"Notices of the pendency of the class actions were widely published in July 1969. These notices advised that each member of a consumer class could take part in the settlement in one of two ways: first, he could file a claim for direct participation in the settlement fund or, second, he could remain in the class but not file a claim, this latter choice constituting an authorization for use for the benefit of all citizens of the government entity involved (in such manner as the Court might direct) of whatever money might be received on account of his purchases of broad spectrum antibiotic drugs."

Attached to the mailed notices to consumers was a list of the separate amounts proposed to be paid by defendants with respect to the total claims represented in each action. Reference was also made to the division of these amounts in the Alabama Plan as between the three different types of claims already explained, and that defendants had taken no position as to that division. It was stated: "The further allocation into sums payable on account of the three types of claims will, however, be considered at the March 24, 1970 hearing as part of the proposed compromise". The same information was given in mailed notices to government institutional class members in government entity actions except that instead of a list of amounts to be paid by defendants in each of the 66 settling actions they were advised of the separate amount to be paid by defendants in their action and how this was divided in the Alabama Plan as between the three types of claims.

The mailed notice to members of the wholesaler-retailer class contained this statement:

"At the hearing on March 24, 1970 the Court will consider whether to enter an order adjudicating that any wholesaler or retailer who failed timely to request exclusion from the class and failed timely to mail a proof of claim has no claim against defendants with respect to purchases of broad spectrum antibiotic drugs and no claim against the settlement fund."

Proofs of the mailing of notices and of the publication of notice in newspapers have been filed.

14. The Settlement Amount Offered and its Proposed Allocation

It may be useful to recapitulate at this point and to set out the amounts proposed to be paid by defendants in settlement of each action as well as the details of the further allocation proposed, recognizing that whatever allocation is approved at this stage must be followed by a further division between members of the several classes.

The amount to be paid to the wholesaler-retailer class is $3,013,939 plus interest on the escrow fund to November 23 or December 23, 1970.

The amount to be paid on account of all claims of all parties plaintiff, and of all classes represented, in the actions of government entities accepting the settlement (numbered 1 through 51 of Exhibit A) is $79,557,269 (subject to some downward adjustment on account of expenses of the settlement not already deducted).

The amounts proposed by defendants to be paid in respect of the claims in each separate action will now be given, and also the proposed allocation of those amounts in the Alabama Plan as between the three classes: (a) government entities on account of institutional purchases ("institutional purchases"), (b)

government entities on account of vendor reimbursements under public assistance programs ("vendor reimbursements"), and (c) government entities on account of individual unreimbursed purchasers ("consumers"). The amounts to be paid by defendants are taken from their Election and its Addendum, with some adjustments later made by them and explained at the end of this section.

The amounts shown as allocated to the three classes will in total be slightly more than the amount shown as proposed to be paid by defendants in each action. This is because the allocations were made in the Alabama Plan without any deduction for administrative expenses payable from the settlement amounts. The same *ratio* shown by the allocations, however, is proposed to be applied to the exact amounts payable by defendants in each action.

It should be noted that the amounts shown as proposed to be paid by defendants are subject to further adjustments downward on account of administrative expenses as finally approved by the Court.

1. The State of Alabama v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1099
   $2,016,855

institutional purchases	$1,355,000
vendor reimbursements	
consumers	666,000
	$2,021,000

2. State of Alaska v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 2357
   $63,969

institutional purchases	$ 10,000
vendor reimbursements	6,000
consumers	48,100
	$ 64,100

3. The State of Arizona and The County of Maricopa v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 1698
   $530,310

institutional purchases	$ 265,000
vendor reimbursements	
consumers	266,400
	$ 531,400

4. The State of Arkansas v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 778
   $860,831

institutional purchases	$ 500,000
vendor reimbursements	
consumers	362,600
	$ 862,600

5. The State of Colorado v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5141
   $761,735

institutional purchases	$ 395,000
vendor reimbursements	113,000
consumers	255,300
	$ 763,300

6. City and County of Denver v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4930
   $204,480

institutional purchases	$ 105,000
vendor reimbursements	
consumers	99,900
	$ 204,900

7. State of Connecticut v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4323
   $932,084

institutional purchases	$ 215,000
vendor reimbursements	201,000
consumers	518,000
	$ 934,000

8. City of Philadelphia and City of Detroit v. Chas. Pfizer & Co., Inc., et al., 68 Civ. 4298

   State of Delaware: $158,175

institutional purchases	$ 65,000
vendor reimbursements	1,000
consumers	92,500
	$ 158,500

   Tampa, Florida: $130,232

institutional purchases	$ 75,000
vendor reimbursements	
consumers	55,500
	$ 130,500

   Honolulu, Hawaii: $113,367

institutional purchases	$ 10,000
vendor reimbursements	
consumers	103,600
	$ 113,600

   Detroit, Michigan: $539,292

institutional purchases	$ 200,000
vendor reimbursements	
consumers	340,400
	$ 540,400

   Dearborn, Michigan: $22,154

institutional purchases	$
vendor reimbursements	
consumers	22,200
	$ 22,200

   Lansing, Michigan: $22,154

institutional purchases	$
vendor reimbursements	
consumers	22,200
	$ 22,200

   Madison Heights, Michigan: $7,385

institutional purchases	$
vendor reimbursements	
consumers	7,400
	$ 7,400

   Township of Redford, Michigan: $14,770

institutional purchases	$
vendor reimbursements	
consumers	14,800
	$ 14,800

Buffalo, New York: $107,080

institutional purchases	$
vendor reimbursements	
consumers	107,300
	$ 107,300

Erie County, New York: $380,518

institutional purchases	$ 255,000
vendor reimbursements	19,000
consumers	107,300
	$ 381,300

Akron, Ohio: $59,079

institutional purchases	
vendor reimbursements	
consumers	$ 59,200
	$ 59,200

Cleveland, Ohio: $262,061

institutional purchases	$ 85,000
vendor reimbursements	
consumers	177,600
	$ 262,600

Summit County, Ohio: $44,309

institutional purchases	$
vendor reimbursements	
consumers	44,400
	$ 44,400

Philadelphia, Pennsylvania: $935,078

institutional purchases	$ 530,000
vendor reimbursements	
consumers	407,000
	$ 937,000

Pittsburgh, Pennsylvania: $121,850

institutional purchases	$
vendor reimbursements	
consumers	122,100
	$ 122,100

Allegheny County, Pennsylvania: $221,744

institutional purchases	$ 15,000
vendor reimbursements	
consumers	207,200
	$ 222,200

9. The District of Columbia v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 2778

$450,474

institutional purchases	$ 295,000
vendor reimbursements	1,000
consumers	155,400
	$ 451,400

10. The State of Florida v. Chas. Pfizer & Co., Inc., et al. 67 Civ. 4143

$3,125,706

institutional purchases	$1,813,530
vendor reimbursements	364,000
consumers	954,600
	$3,132,130

11. The State of Georgia v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 153

$2,667,543

institutional purchases	$1,870,125
vendor reimbursements	
consumers	802,900
	$2,673,025

12. State of Idaho v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 897

$366,148

institutional purchases	$ 230,000
vendor reimbursements	
consumers	136,900
	$ 366,900

13. The State of Illinois v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 273

$4,492,660

institutional purchases	$2,154,593
vendor reimbursements	1,019,000
consumers	1,328,300
	$4,501,893

14. The City of Chicago v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 901

$804,846

institutional purchases	$ 85,000
vendor reimbursements	
consumers	721,500
	$ 806,500

15. The State of Indiana v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 3157

$2,534,691

institutional purchases	$1,390,000
vendor reimbursements	199,000
consumers	950,900
	$2,539,900

16. The State of Iowa v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4297

$1,647,015

institutional purchases	$ 815,000
vendor reimbursements	273,000
consumers	562,400
	$1,650,400

17. The Commonwealth of Kentucky v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4453

$1,339,148

institutional purchases	$ 515,000
vendor reimbursements	209,000
consumers	617,900
	$1,341,900

18. The State of Louisiana v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1380

$2,514,133

institutional purchases	$1,630,000
vendor reimbursements	227,000
consumers	662,300
	$2,519,300

19. The State of Maine v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 916

$244,613

institutional purchases	$ 49,016
vendor reimbursements	
consumers	196,100
	$ 245,116

20. The State of Maryland v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4324

$945,357

institutional purchases	$ 395,000
vendor reimbursements	112,000
consumers	440,300
	$ 947,300

21. The Mayor and City Council of Baltimore v. Chas. Pfizer & Co., Inc., et al., 68 Civ. 4325

$601,165

institutional purchases	$ 410,000
vendor reimbursements	
consumers	192,400
	$ 602,400

22. The Commonwealth of Massachusetts v. Chas. Pfizer & Co., Inc., et al., 68 Civ. 4355

$2,638,078

Institutional purchases	$ 925,000
vendor reimbursements	812,000
consumers	906,500
	$2,643,500

23. City of Boston v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4354

$696,169

Institutional purchases	$ 425,000
vendor reimbursements	132,000
consumers	140,600
	$ 697,600

24. The State of Michigan v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 898

$2,924,415

Institutional purchases	$1,742,725
vendor reimbursements	
consumers	1,187,700
	$2,930,425

25. The State of Minnesota v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 735

$2,447,743

Institutional purchases	$1,314,173
vendor reimbursements	443,000
consumers	695,600
	$2,452,773

26. The State of Mississippi v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1625

$1,379,455

Institutional purchases	$ 938,290
vendor reimbursements	
consumers	444,000
	$1,382,290

27. The State of Missouri v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5180

$2,004,920

Institutional purchases	$1,081,440
vendor reimbursements	47,000
consumers	880,600
	$2,009,040

28. The State of Montana v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 1278

$237,412

Institutional purchases	$ 50,000
vendor reimbursements	51,000
consumers	136,900
	$ 237,900

29. The State of Nebraska v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 2106

$682,437

Institutional purchases	$ 354,240
vendor reimbursements	41,000
consumers	288,600
	$ 683,840

30. The State of New Hampshire v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4878

$272,241

Institutional purchases	$ 100,000
vendor reimbursements	47,000
consumers	125,800
	$ 272,800

31. State of New Jersey v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4929

$2,643,368

Institutional purchases	$1,200,000
vendor reimbursements	213,000
consumers	1,235,800
	$2,648,800

32. State of New Mexico v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4326

$547,275

Institutional purchases	$ 255,000
vendor reimbursements	101,000
consumers	192,400
	$ 548,400

33. The State of New York v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 845

$3,901,881

Institutional purchases	$1,965,000
vendor reimbursements	328,000
consumers	1,616,900
	$3,909,000

34. Chas. Pfizer & Co., Inc. v. The City of New York, et al. 64 Civ. 1742

$5,618,054

Institutional purchases	$3,750,000
vendor reimbursements	296,000
consumers	1,583,600
	$5,629,600

35. The State of North Dakota v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1626

$242,003

Institutional purchases	$ 40,000
vendor reimbursements	73,000
consumers	129,500
	$ 242,500

36. State of Ohio v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 2019

$3,755,949

Institutional purchases	$1,676,068
vendor reimbursements	393,000
consumers	1,694,600
	$3,763,668

37. The State of Oklahoma v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5096

$1,051,439

Institutional purchases	$ 580,000
vendor reimbursements	
consumers	473,600
	$1,053,600

38. The Commonwealth of Pennsylvania v. Chas. Pfizer & Co., Inc., et al., 68 Civ. 1212

$3,410,790

Institutional purchases	$ 940,000
vendor reimbursements	909,000
consumers	1,568,800
	$3,417,800

39. Commonwealth of Puerto Rico v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 806

$1,199,834

Institutional purchases	$ 725,000
vendor reimbursements	
consumers	477,300
	$1,202,300

40. The State of Rhode Island v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5112

$424,029

institutional purchases	$ 95,000
vendor reimbursements	156,000
consumers	173,900
	$ 424,900

41. The State of South Carolina v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 777

$1,395,831

institutional purchases	$ 910,000
vendor reimbursements	4,000
consumers	484,700
	$1,398,700

42. The State of South Dakota v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 205

$262,061

institutional purchases	$ 70,000
vendor reimbursements	52,000
consumers	140,600
	$ 262,600

43. The State of Tennessee v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 1631

$1,557,676

institutional purchases	$ 971,977
vendor reimbursements	45,000
consumers	543,900
	$1,560,877

44. The City of Memphis, Tennessee v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 1807

$289,305

institutional purchases	$ 190,000
vendor reimbursements	
consumers	99,900
	$ 289,900

45. The Metropolitan Government of Nashville and Davidson County v. Chas. Pfizer & Co., Inc., et al., 69 Civ. 899

$146,100

institutional purchases	$ 65,000
vendor reimbursements	
consumers	81,400
	$ 146,400

46. The State of Texas v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 4375

$4,640,971

institutional purchases	$2,700,609
vendor reimbursements	
consumers	1,949,900
	$4,650,509

47. The State of Vermont v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 915

$101,192

institutional purchases	$ 20,000
vendor reimbursements	
consumers	81,400
	$ 101,400

48. The Commonwealth of Virginia v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 5140

$1,412,522

institutional purchases	$ 598,825
vendor reimbursements	10,000
consumers	806,600
	$1,415,425

49. The State of West Virginia v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 240

State of Nevada: $279,433

institutional purchases	$ 212,807
vendor reimbursements	8,000
consumers	59,200
	$ 280,007

State of West Virginia: $867,648

institutional purchases	$ 338,031
vendor reimbursements	154,000
consumers	377,400
	$ 869,431

50. The State of Wisconsin v. Chas. Pfizer & Co., Inc., et al. 68 Civ. 91

$1,940,548

institutional purchases	$ 906,936
vendor reimbursements	231,000
consumers	806,600
	$1,944,536

51. State of Wyoming v. Chas. Pfizer & Co., Inc., et al. 69 Civ. 900

$343,479

institutional purchases	$ 246,585
vendor reimbursements	31,000
consumers	66,600
	$ 344,185

The figures given above for actions 8 and 24 are not quite the same as those shown in the Alabama Plan and the Election of defendants. This is due to mistakes made inadvertently in the Alabama Plan.

Both the City and County of Honolulu are intervenor plaintiffs in the action (numbered 8 above) of City of Philadelphia and City of Detroit. The *County* of Honolulu was overlooked as a settling plaintiff in computing the allocations of the Alabama Plan. The County, however, has no hospital beds additional to those of the City and thus no change in the figures for institutional purchases is required. The County has no vendor reimbursement program and no change in those figures is required. But the County does have a population not included in that of the City; using the percentage formula based on the 1960 census an allocation of $44,400 was required for the consumer class in the County. This meant an addition of $44,400 to the Alabama Plan figure of $59,200 for the Honolulu consumer class, or a total of $103,600 for this Honolulu (City and County) class. Adjusted for expenses on the basis used in the October 20, 1969 Election of defendants, this $44,400 was reduced to $44,309 and

the figure for Honolulu (City and County) in the Election increased by the same amount to the $113,367 shown as now proposed in settlement.

The claim of Maybury Sanitorium (based on its hospital beds) was included in the Alabama Plan among those represented in the State of Michigan action (numbered 24 above). This turned out to be a mistake because Maybury Sanitorium, apparently located to the west of and outside the City of Detroit, is in fact operated by, and thus an institution of, the City of Detroit. The claim of Maybury Sanitorium should, therefore, be transferred from the class represented by State of Michigan (action numbered 24) to the class represented by the City of Detroit (action numbered 8). This means an increase of $5000 in the allocation in the Alabama Plan for institutional purchases in the City of Detroit action to $200,000 and a decrease of the same amount in the allocation in the Alabama Plan for institutional purchases in the State of Michigan action to $1,742,725. The $5000 represented in the Alabama Plan by the claim of the Maybury Sanitorium when adjusted for expenses on the basis used in the October 20, 1969 Election of defendants becomes $4990. This amount added to the settlement amount for City of Detroit claims and subtracted from the settlement amount for State of Michigan claims yields the correct figures for the proposal of defendants in settlement of these claims.

The amount shown above for the State of Missouri action (numbered 27 above) as proposed to be paid by defendants in respect of the claims in that action is the same as in the Election of defendants. However, the allocation amounts as between claims in this action for institutional purchases, vendor reimbursements, and consumers are not the same as in the Alabama Plan as filed. This is because, as already explained, the Alabama Plan by oversight did not make an allocation to Kansas City, Missouri, as a separate government entity plaintiff and did not reflect any reduction in the settlement amount by reason of rejection of the proposed compromise by Kansas City, Missouri. The figure in the Alabama Plan for institutional purchases in the Missouri action was $1,200,000. This has been reduced by $118,560 to $1,081,-440. The $118,560 is the amount for Kansas City institutional purchases, calculated by the hospital bed formula of the Alabama Plan.

As earlier explained, the City of Santa Clara, California, is an intervenor plaintiff in the action of City of Philadelphia and City of Detroit; an order filed June 19, 1969 determined that the City of Santa Clara should not maintain a class action for consumers. The Alabama Plan contained an allocation of $75,000 to City of Santa Clara on account of claims for institutional purchases. The Election of defendants contained a similar amount for City of Santa Clara, reduced for expenses at the time of election to $74,846. It turns out, however, that the parties had confused the City of Santa Clara and the County of Santa Clara; the figure for "Santa Clara" in the Alabama Plan was calculated by use in the hospital bed formula of the hospital beds of the County; it appears that in the American Hospital Guide there are no hospital beds shown for institutions of the City of Santa Clara and according to the formula employed there should have been no allocation to the City of Santa Clara. Because of this mistake of fact, the parties have now eliminated any proposed payment to City of Santa Clara.

15. Hearing on the Proposed Compromise

In accordance with the several notices, the hearing on the proposed compromise began on March 24, 1970 and continued that day and the following day. No testimony was presented but both before, at, and after the hearing many affidavits, exhibits, and memoranda were submitted.

Three members of the consumer class made statements, two for the proposed settlement and one neither for nor against.

An attorney for a consumer wished to make a statement but since it appeared that this consumer was maintaining an action and was not accepting the settlement, his attorney was not heard.

A member of the wholesaler-retailer class made a statement for the proposed settlement; another made an opposing statement.

Attorneys for many plaintiffs and for defendants were heard in support of the proposed settlement.

An attorney for six persons in Virginia, said to have been individual purchasers and members of the consumer class, was heard at some length in opposition to the proposed compromise. Aside from anything else, his position has to a considerable extent been weakened by the reversal (since the hearing) of the criminal conviction of three of defendants; he said (SM 268): "Suppose it is reversed. We are in a different ball game". It is, of course, possible that the Supreme Court will grant certiorari and reverse; what is significant at this point is the uncertainty of the outcome of the criminal proceeding.

It deserves emphasis that, except for the attorney for the six Virginians, no one at the hearing expressed any opposition to the *total* amount offered by defendants to be paid in settlement.

The only opposition was as to two aspects of the allocation.

An attorney for the City of Philadelphia and other government entities, who had been active in negotiating the settlement, ably argued that the allocation of the $97,000,000 among government entity plaintiffs as class representatives should be on the basis of population alone and not by use of any hospital bed or vendor reimbursement formulas. While making this point, the attorney urged (SM 74) that the settlement sum was "good", was "fair", and that "the overall settlement should be approved by the Court".

There was opposition by a number of attorneys for retail drug stores to the $3,000,000 allocation to the wholesaler-retailer class. They urged that $40,000,000 should be allocated to that class. They were fully heard. Attorneys for the Committee of Counsel of the wholesaler-retailer class were heard in support of the allocation, as increased by the interest on the escrow fund.

An attorney for the United States was heard in respect of an aspect of the vendor reimbursement program; his point did not involve either support of, or opposition to, the settlement.

Some messages were received from class members who did not appear at the hearing.

Two messages were received from members of the wholesaler-retailer class, one favoring and one opposing the proposed compromise.

Three consumer members wrote in opposition to the settlement, one because there was an allocation to the wholesaler-retailer class, one because administrative costs were to be paid from the settlement amount, and one because (allegedly) the administrative costs would be wasteful.

No member of any government entity institutional class wrote, either to object to the settlement or to approve it.

H. PRINCIPLES FOR VIEWING THE PROPOSED COMPROMISE

[1] Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.

[2] The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be liti-

gated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation, * * * and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise". The Supreme Court then emphasizes:

> "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."

The quotations are from Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–425, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968).

Our Court of Appeals has described this factor as the "risk and cost of further litigation". Neuwirth v. Allen, 338 F.2d 2, 3 (2d Cir. 1964).

In this connection; the judgment of counsel to plaintiffs (the class representatives) must be considered as well as the extent of support from interested parties and the presence or absence of good faith bargaining. The nature of any questions of law and issues of fact is also a factor for consideration.

The precedents in this field are collected and discussed in Haudek, The Settlement and Dismissal of Stockholders' Actions, 23 Sw.L.J. 765, 792–801 (1969).

[3] There is a further important principle to be observed in respect of judicial consideration of proposed settlements. This is that the judge does not try out or attempt to decide the merits of the controversy. "Any virtue which may reside in a compromise is based on doing away with the effect of such a decision". In re Riggi Bros. Co., Inc., 42 F.2d 174, 176 (2d Cir. 1930), cert. denied under name Woods & Selick, Inc. v. Todd, 282 U.S. 881, 51 S.Ct. 85, 75 L. Ed. 777 (1930). See also Schleiff v. Ches. & Ohio Ry. Co., 43 F.R.D. 175, 178–179 (S.D.N.Y.1967) and cases there collected.

I. CONCLUSION: APPROVAL OF THE PROPOSED COMPROMISE

It has taken far longer to set out the background of this application than will be required to explain the decision.

Negotiations which led to the proposed compromise began in March 1968 and were intensive from about October 15, 1968 through about February 1, 1969. Six attorneys for government entity plaintiffs, all of whom are able and aggressive antitrust law specialists, negotiated with attorneys for defendants with the same qualities. From the affidavits submitted and from the Court's knowledge of the progress of these actions, it is clear that the proposed compromise was the result of good faith bargaining at arms' length.

The situation here is unique in that the evidence on which liability at trial would depend is in substantial part before the Court on this application. That evidence is in the extensive record before the Sixth Circuit Court of Appeals in the Commission proceeding and in the extensive record before our Court of Appeals in the criminal proceeding.

A careful study of those records leads to a conclusion that the chances of recovery in any of these cases are no better than 50–50 and probably should more realistically be called slight. The more significant reasons for this conclusion will be mentioned.

After two exhaustive and lengthy investigations by two agencies of the government, there are no findings of any misconduct by any of the defendants which would show, even prima facie, a violation of the antitrust laws. The only findings of misconduct are those by the Commission that Pfizer and Cyanamid each in substance committed a fraud on the Patent Office; the Commission, however, found that no conspiracy in this respect between Pfizer and Cyanamid had been proved. As to the separate misconduct of Pfizer and Cyanamid before the Patent Office, our Court of Appeals has said that this is relevant to the

issue of violation of the antitrust laws "only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others".

In the Commission proceeding, the first Hearing Examiner saw and heard all the witnesses; he considered all the other evidence offered. His opinion was carefully reasoned and his conclusion was that no defendant had violated any law. The Commission did not agree but the opinion of the first Hearing Examiner remains persuasive to a degree and at least shows that the issues are doubtful. In the final result, it was found only that Pfizer and Cyanamid separately had committed fraud on the Patent Office.

Thus, in the Commission proceedings there are no findings of any misconduct by three of the defendants—Bristol, Squibb and Upjohn. As to the other two defendants, Pfizer and Cyanamid, the only finding of misconduct has to do with patent prosecutions in the Patent Office. Aside from serious questions of law about the effect of this misconduct, it would not itself constitute any violation of the antitrust laws; at best, it might arguably be some evidence of an attempt to monopolize.

The misconduct also raises a troublesome question of patent law. This is the question whether the presence of tetracycline in the broth or in the product (Aureomycin) would be sufficient to justify denial of a patent on tetracycline. The inherent production of tetracycline was not known before Conover and did not appear to have imparted any utility to Aureomycin. Hearing Examiner Piper concluded that tetracycline was therefore patentable, citing (among other decisions) Parke Davis & Co. v. H. K. Mulford Co., 189 F. 95 (C.C. N.Y.1911; L. Hand, J.), affirmed 196 F. 496 (2d Cir. 1912). The Commission disagreed and Judge (then Commissioner) Higginbotham wrote ably on the subject. It is not necessary on this application to decide the question of patent law. Its significance is that it exists and that the answer is not clear.

In the criminal proceeding, the jurors required a considerable time to reach a verdict and were clearly puzzled by the Parke Davis situation. Our Court of Appeals found, among other things, that defendants were wrongly restricted in argument about the Parke Davis situation and that the Court had mistakenly charged about Parke Davis. Whether the jury would have otherwise convicted is at least doubtful. The reversal of the judgment of conviction leaves the criminal proceeding without substantial effect at this point except as it shows that the outcome of a jury trial and any appeals is highly problematical; the prima facie effect of a final judgment in a criminal proceeding (15 U.S.C. § 16) is at least postponed to a date long in the future.

The Parke Davis situation, as developed in the evidence at the criminal trial, is itself a ground for feeling that recovery by plaintiffs is not likely. The situation is, according to the opinion of the Court of Appeals, that Parke Davis was not a member of any conspiracy; that it had the second largest share of the antibiotics market; that it made some 24% of all sales (and thus sold more than four of the defendants here); that its prices were the same as those of defendants; and that its other marketing practices were the same as those of defendants.

Not only is it uncertain that any plaintiff can secure a jury verdict. It is also uncertain whether judges or justices will find the evidence sufficient to support any such verdict.

There is no direct evidence of any price fixing or of any conspiracy. Such evidence as there is must come almost entirely from the defendants themselves and, as the Court of Appeals noted, "the facts may be said to be virtually undisputed". Before the first Hearing Examiner and at the criminal trial, executives of defendants testified. They denied the existence of any conspiracy or any price

fixing. Even if a jury chose to disbelieve such testimony, it is at least questionable whether there is other evidence sufficient to support a verdict for a plaintiff.

The Court of Appeals did not reach the issue of the sufficiency of the evidence to support the criminal conviction. As before noted, the dissenting judge found the evidence sufficient but "not overwhelming". Of course, the standard of proof in a civil action is not as high as that in a criminal proceeding.

In respect of damages, there are a number of doubtful questions both of law and of fact. There is no occasion to discuss these in any detail.

One of the questions of law, for example, is whether the Commission proceeding tolled the statute of limitations so that damages could be recovered for a 4 year period before July 1958 when that proceeding was commenced. This depends on whether the Federal Trade Commission Act is part of the "antitrust laws" as that term is used in Section 5(b) of the Clayton Act (15 U.S.C. § 16(b)). It is not within the definition of the term in the Clayton Act (15 U.S.C. § 12) and there are two decisions that Commission proceedings do not toll the statute of limitations. Laitram Corp. v. Deepsouth Packing Co., 279 F.Supp. 883 (E.D.La.1968); Rader v. Balfour, 1969 Trade Cas. ¶ 72,709 (N.D.Ill.1968). A contrary result was reached in Lippa's, Inc. v. Lenox, Inc., 305 F.Supp. 182 (D.Vt.1969).

One of the questions of fact, for example, is whether, if there were any conspiracy, it "ended in July 1960", as Judge Frankel appears to have believed (Record on Appeal 5013a), or whether it continued for several years thereafter, as many of the complaints aver.

In considering the proposed compromise, it seems also to be of importance that (if approved) the substantial amounts of money are available for class members *now*, and not at some distant time in the future. The nature of these actions is such that a final judgment, assuming it to be favorable, could only be obtained after years of expensive litigation. It has been held proper "to take the bird in hand instead of a prospective flock in the bush". Ladd v. Brickley, 158 F.2d 212, 220 (1st Cir. 1946), cert. denied 330 U.S. 819, 67 S.Ct. 676, 91 L.Ed. 1271 (1947).

The proposed compromise is supported by a very high percentage of all the plaintiffs to which it was offered. The law officers of forty-three states, Puerto Rico, and the District of Columbia—almost all with retained specialist counsel—urge approval of the settlement. All except three of the cities ask approval; among those asking approval is the City of New York, whose counterclaim was the earliest of these claims. Nearly all of the wholesalers and retailers ask approval; these include the plaintiffs in the first action commenced for the class of retail drug stores.

[4] The strong support for the proposed compromise is a factor of great weight.

At the same time, it has to be considered that California, six other states, two counties in California, and Kansas City, Missouri, have rejected the offered settlement. These rejecting plaintiffs are represented by able and experienced counsel whose opinions about the proposed compromise must also be taken seriously into account. Even among the best lawyers, however, opinions may, and often do, differ. It is felt that in this instance a misplaced optimism about a highly problematical result has led to the exercise of questionable judgment. The rejection of the settlement occurred, of course, before the criminal convictions of three of the defendants had been reversed by the Court of Appeals. It must also be recognized that ultimately a larger recovery may possibly be obtained by the rejecting plaintiffs than the amount presently available in settlement. However, the chances of this occurring do not seem to be very great.

It is known from past experience that no matter how confident one may be of

Posture of Pfizer and Cyanamid to Obtain a Monopoly on Tetracycline

As pointed out in our earlier opinion, tetracycline has been described as "currently the best selling wonder drug in the United States." The complaint in this proceeding stated that the antibiotics industry is one of dynamic growth, with sales exceeding $330 million per year, and that tetracycline enjoys the largest sale by dollar volume, aggregating more than $100 million in 1957.

At the time the application for a patent on tetracycline was pending before the Patent Office, Pfizer and Cyanamid were in a posture to establish a monopoly in the production and sale of this drug which is of vital and unique importance in the treatment and cure of many diseases and of considerable impact upon the public health.

Penicillin was never patented. Nobody obtained a monopoly on it. Its production and sale proved to be fiercely competitive and profits were marginal.[5]

On September 13, 1949, Cyanamid obtained its patent on aureomycin (Duggar patent No. 2,482,055). On September 2, 1952, Cyanamid obtained an improvement patent on the Duggar process for producing aureomycin (Niedercorn patent No. 2,609,329). On July 19, 1950, Pfizer obtained a patent on terramycin (Sobin patent No. 2,516,080). As a result of these patents, Cyanamid and Pfizer have had a legal monopoly on the production and sale of aureomycin and terramycin, respectively.

On October 23, 1952, Pfizer filed its Conover application for a patent on tetracycline. This was followed on March 16, 1953, by Cyanamid's Boothe-Morton application for a patent on tetracycline. On October 29, 1953, Lidoff declared

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[5] Cyanamid's attorney stated in a written memorandum to Lidoff in 1954, during the second interference proceeding, that Cyanamid would rather pay royalties on tetracycline to a bona fide patentee than see the pharmaceutical business in which it has a major interest ruined by irresponsible price cutting.

an interference for the purpose of determining priority of invention between these two applications.

In the meantime Heyden Chemical Company filed its Minieri application for a patent on tetracycline. On November 4, 1953, Cyanamid made a contract to acquire the Antibiotic Division of Heyden, including the rights to the Minieri patent application.

Thereupon Pfizer and Cyanamid executed a cross-licensing agreement.[6] Under this agreement, and with Heyden's Minieri application now owned by Cyanamid, these two companies were assured of sharing a monopoly on tetracycline if the Patent Office could be persuaded to grant a patent to either of them. Cyanamid then conceded that Pfizer's Conover application had priority in time and withdrew its Boothe-Morton application. This resulted in termination of the first interference on February 9, 1954, and removal of one obstacle from the pathway to obtaining a patent.

Another obstacle was an application filed by Bristol-Myers Company for a patent on tetracycline. As a result of Bristol's application, Lidoff declared a second interference, which continued from March 2, 1954, until October 14, 1954. The proceedings during this interference, its subsequent dissolution and the events following dissolution leading up to the ultimate granting of the patent to Pfizer encompass the issues of fact now before this Court.

Obligation of Parties in Patent Office Proceedings

The Patent Office, not having testing facilities of its own, must rely upon information furnished by applicants and their attorneys. Pfizer and Cyanamid, like all other applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful disclosure.

In *Kingsland* v. *Dorsey*, 338 U.S. 318, 319, the Supreme Court quoted with approval the following:

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[6] Negotiations had begun in November 1953. The formal agreement was executed January 11, 1954.

the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

In Piccard v. Sperry Corp., 36 F.Supp. 1006 (S.D.N.Y.), affirmed 120 F.2d 328 (2d Cir. 1941), a proposed settlement was disapproved. The action was then tried on the merits, resulting in judgment for defendants (48 F.Supp. 465 (S.D.N.Y.1943), affirmed 152 F.2d 462 (2d Cir.), cert. denied 328 U.S. 845, 66 S.Ct. 1024, 90 L.Ed. 1619 (1946)).

In Upson v. Otis, 155 F.2d 606 (2d Cir. 1946), approval of a settlement was reversed; the Court saying (at 612): "on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of recovery beyond doubt greater than that offered in the settlement. Accordingly it was an abuse of discretion to approve the settlement". The action was then tried and plaintiffs obtained a judgment, twice considered by the Court of Appeals (168 F.2d 649, 169 F.2d 148 (1948)). We are told, however, that "the ultimate recovery * * * turned out to be substantially less than the amount of the rejected compromise". Haudek, The Settlement and Dismissal of Stockholders' Actions, 23 Sw.L.J. 765, 794 (1969).

[5] It is concluded that for many good reasons the proposed compromise should be approved. This approval extends to the allocation of dollar amounts as between the several actions (reflected in the Election of defendants and set out above) and also to the allocation of dollar amounts in each of the government entity actions as between institutional purchases, vendor reimbursements, and consumers (as reflected in the Alabama Plan and set out above).

The point made by the attorney for City of Philadelphia and others, that division should be on the basis of population, has been carefully considered. Such a method may well be reasonable. But the method employed in the Alabama Plan is also reasonable and it also makes use of objective data from independent, neutral sources. There is no sufficient reason for rejecting the method of division in the Alabama Plan, in the light of the widespread support which it commands.

Specific mention should be made of several matters.

1. Allocation to the Wholesaler-Retailer Class

As shown above, the proposed compromise includes for claims of members of the wholesaler-retailer class the sum of $3,013,939 plus the interest on the escrow fund to November 23 or December 23, 1970.

This allocation, as well as the rest of the proposed compromise, is strongly supported by nearly all the representatives of the wholesaler-retailer class. As before explained, for purposes of administering the settlement all actions on behalf of this class in which the plaintiffs had accepted the settlement were consolidated by the May 26, 1969 order. There were 13 such actions. All counsel of record for any parties plaintiff in these actions were constituted a Committee of Counsel.

Counsel for plaintiffs in 11 of the 13 actions support the present application, urging its approval; counsel for plaintiffs in one of the 13 actions has taken no position; and counsel for plaintiffs in one of the 13 actions have opposed as inadequate the allocation to this class.

Attorneys from the Committee of Counsel for the wholesaler-retailer class argued at the hearing in support of the settlement. Two attorneys for plaintiffs in one of the 13 consolidated wholesaler-retailer actions argued against the allocation proposed for the wholesaler-retailer class, as did two attorneys for

certain members of the class; one attorney for some members of this class said at the hearing: "* * * we are not completely or * * * not opposed to this plan as such, but we are not necessarily in favor of it either" (SM 181).

As earlier explained, representatives of the wholesaler-retailer class unanimously proposed an allocation of $40,000,000 to that class. Insistence on that figure would almost certainly have destroyed any chance of settlement. Nearly all members of the Committee of Counsel for the class accepted a compromise, under which (in substance) defendants, for the benefit of the wholesaler-retailer class, paid the settlement amount into escrow before they could have been required to make any payment.

The few opposing members of the wholesaler-retailer class are critical of many of the procedural steps taken by the Court. Their criticisms need not be examined in detail. They all concern the orientation of the procedure toward settlement administration rather than toward discovery, decision of law points, and the like. This orientation was deliberately chosen in order to determine which class members wished to settle and which class members wished to litigate. All members were given an option to exclude themselves from their class. It was also recognized that in class actions, orders "may be altered or amended as may be desirable from time to time" (Fed.R.Civ.P. 23(d)).

The only argument of any possible substance for the opposing members of this class is that the damage to the class is easily provable and, as a matter of law, cannot be denied by defendants.

Without attempting to decide the matter, it appears at first glance to be highly doubtful whether wholesalers or retailers suffered any damage whatever. Defendants sold only in dosage form; this means that the wholesaler then sold in the original packages (at a mark-up of 16⅔% or more over cost) and that—if the retail druggist did not always sell in the original packages but repackaged in varying quantities—at least the retail druggist sold the dosage form just as received from a wholesaler or from a defendant and without any addition, subtraction or combination. To the consumer, antibiotics are sold only by prescription. In some instances the retail druggist may charge his cost, plus a flat professional fee. According to affidavits of experts in the field, however, the overwhelming majority of drug stores in the period 1953–66 charged for prescription drugs a uniform mark-up of 66⅔% over cost. If so, this would mean that any overcharge by defendants in violation of the antitrust laws was passed on to the end use purchaser. The result is that wholesalers and retailers, far from sustaining damages, made substantial profits from any antitrust violations.

It is suggested that the wholesalers and retailers lost sales because of the alleged high prices and that thus they suffered damage. No decision can be made on this record whether in fact the suggestion is true or not. There is persuasive evidence in the Commission proceeding and at the criminal trial that the suggestion is not true. The reason is that doctors prescribe antibiotics and doctors look to the health of the patient rather than to the price of the needed drug.

The representatives of the wholesaler-retailer class, both those in favor of and those opposed to the present proposed allocation, contend that as a matter of law their class members may recover for any illegal overcharges by defendants, whether or not these were collected from the end use consumers. They rely on Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). Their reliance might after long litigation prove to be well placed. For present purposes, no decision is required but it is very doubtful, to say the least, that *Hanover* would apply to the situation here; the point must be regarded as highly uncertain.

the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

In Piccard v. Sperry Corp., 36 F.Supp. 1006 (S.D.N.Y.), affirmed 120 F.2d 328 (2d Cir. 1941), a proposed settlement was disapproved. The action was then tried on the merits, resulting in judgment for defendants (48 F.Supp. 465 (S.D.N.Y.1943), affirmed 152 F.2d 462 (2d Cir.), cert. denied 328 U.S. 845, 66 S.Ct. 1024, 90 L.Ed. 1619 (1946)).

In Upson v. Otis, 155 F.2d 606 (2d Cir. 1946), approval of a settlement was reversed, the Court saying (at 612): "on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of recovery beyond doubt greater than that offered in the settlement. Accordingly it was an abuse of discretion to approve the settlement". The action was then tried and plaintiffs obtained a judgment, twice considered by the Court of Appeals (168 F.2d 649, 169 F.2d 148 (1948)). We are told, however, that "the ultimate recovery * * * turned out to be substantially less than the amount of the rejected compromise". Haudek, The Settlement and Dismissal of Stockholders' Actions, 23 Sw.L.J. 765, 794 (1969).

[5] It is concluded that for many good reasons the proposed compromise should be approved. This approval extends to the allocation of dollar amounts as between the several actions (reflected in the Election of defendants and set out above) and also to the allocation of dollar amounts in each of the government entity actions as between institutional purchases, vendor reimbursements, and consumers (as reflected in the Alabama Plan and set out above).

The point made by the attorney for City of Philadelphia and others, that division should be on the basis of population, has been carefully considered. Such a method may well be reasonable. But the method employed in the Alabama Plan is also reasonable and it also makes use of objective data from independent, neutral sources. There is no sufficient reason for rejecting the method of division in the Alabama Plan, in the light of the widespread support which it commands.

Specific mention should be made of several matters.

1. Allocation to the Wholesaler-Retailer Class

As shown above, the proposed compromise includes for claims of members of the wholesaler-retailer class the sum of $3,013,939 plus the interest on the escrow fund to November 23 or December 23, 1970.

This allocation, as well as the rest of the proposed compromise, is strongly supported by nearly all the representatives of the wholesaler-retailer class. As before explained, for purposes of administering the settlement all actions on behalf of this class in which the plaintiffs had accepted the settlement were consolidated by the May 26, 1969 order. There were 13 such actions. All counsel of record for any parties plaintiff in these actions were constituted a Committee of Counsel.

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United charged Hanover more for shoe machinery than would have been charged except for the antitrust law violation. The machinery was then used in making shoes from Hanover designs, using all the necessary materials (leather, thread, cloth, etc.) and applying the labor and skills of the Hanover organization. The use of the machinery was by Hanover, which was in the position of a consumer or end user of the machinery. The machinery was not resold, as were the antibiotics in suit. The illegal overcharge in *Hanover* was merely one of many items of cost; as the Court said, it "was *reflected* in the price charged for shoes sold by Hanover to its customers" (392 U.S. at 488, 88 S.Ct. at 2228, emphasis supplied). Here the antibiotics in dosage forms (capsules, tablets, or other forms) were resold just as obtained from defendants. Nothing was added or changed. The mark-up was applied to the cost and the resultant price was collected from the consumer. The higher the cost, the higher the mark-up, and the higher the profit to the members of this class. The situation here seems much like the "'cost-plus' contract" referred to in the *Hanover* opinion; the Supreme Court recognized that in such a case it was easier to prove that there were no damages and that the "passing-on defense" might therefore be valid (392 U.S. at 494, 88 S.Ct. 2224).

Whatever the correct answer to this riddle may be, it is difficult to see in these cases any real damage to wholesalers or retailers.

The attitude of the members of the wholesaler-retailer class indicates no real damage to them.

Notices were sent to some 55,000 members of the wholesaler-retailer class. Claims were filed by about 4100 members (of which about 70 were wholesalers). This seems a surprisingly small percentage of claimants to a sum of money known to be available in settlement. At the same time, about 1500 members excluded themselves from the class. We are told by those opposed to the present allocation that "some 1,500 claim forms [were] returned with statements by druggists that they were not damage[d] and therefore wished to make no claim". Several such statements by druggists were read into the record (SM 371–374). Typical is this statement from a druggist in Wisconsin (SM 372):

> "Any pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists."

The Court in *Hanover* also alluded to the danger to the private enforcement of the antitrust laws if a "passing-on defense" were permitted and recovery allowed only to those who had ultimately paid the higher prices generated by an antitrust violation: "These ultimate consumers * * * would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them." 392 U.S. at 494, 88 S.Ct. at 2232. Here, in contrast to the situation in *Hanover*, that danger does not exist, for it is proposed that much of the settlement amount be made available to ultimate purchasers (institutions or individuals) who are before the Court as plaintiffs and class members and who have sustained the burden of the alleged overcharge. Contrast also State of Minnesota v. United States Steel Corp., 299 F.Supp. 596 (D.Minn.1969), appeal docketed, No. 20184 (8th Cir. March 5, 1970).

[6] The only possible conclusion is that the allocation proposed for the wholesaler-retailer class is fair and reasonable. It is a matter of real concern that the allocation is too high. The situation is, however, that the excess above $3,013,939 (which excess may well be

$8,000,000 or more) is a further contribution to this class by *defendants* and thus does not reduce the amounts for other classes. If defendants by this means choose to make a settlement possible, the Court should encourage the effort rather than defeat it.

2. The Vendor Reimbursement Claims; Position of the United States

As described before, states, counties and cities under public assistance programs often reimbursed vendors for antibiotics delivered to those receiving such assistance. About 50% of the cost of these programs was paid by the federal government under the Social Security Act (42 U.S.C. § 301 and following).

An attorney representing the United States made a statement at the hearing and has submitted papers afterward. It appears that in a separate action by the United States, not among these 66 settling actions, there are claims against defendants based on contributions of the federal government to public assistance programs of states which made reimbursement to vendors for antibiotics.

The defendants contend now, and will contend in the action of the United States, that the present settlement, if consummated, puts to rest all claims by settling government entities, whether the source of the funds employed for antibiotics purchases was the federal government or otherwise. Defendants also contend that the United States has no claim on account of vendor reimbursement under public assistance programs but that the settling government entities are the proper parties to assert any such claim. It is stipulated by defendants and the settling government entities that their intent was to settle all claims from welfare payments "irrespective of reimbursement by any other entity".

The United States takes the position that it has a "separate and independent claim" which "will not be compromised by a judgment in this action" (Hearing, March 25, 1970, SM 298).

All parties, including the United States, agree that it is not necessary at this time to decide what effect this settlement will have on the claim of the United States. It is enough to note that approval of the proposed compromise indicates no opinion whether the United States has or ever had a claim or, if so, whether the compromise extinguishes such claim.

3. City of Santa Clara and Black Horse Pike Regional School District

In the action of City of Philadelphia and City of Detroit (numbered 8 above) the City of Santa Clara is an intervenor plaintiff and so also is the Board of Education of the Black Horse Pike Regional School District (N.J.). Nothing is proposed to be paid in settlement to these two intervenor plaintiffs and, therefore, they can (if they so desire) continue to prosecute their claims in the action; this action as to them will not on the present record be dismissed.

4. Costs of the Settlement Proceeding

It is part of the proposed compromise that "costs incurred in proceedings" of the settlement, including "administrative costs" shall be paid from the settlement amounts (para VI of the settlement plan). This means that any such "costs" advanced by defendants, to the extent approved by the Court, are to be deducted from the settlement amounts. An affidavit submitted by defendants (Wood affidavit, para 18) gives many of these items. When orders are submitted on this decision, defendants should submit in affidavit form a complete list of all moneys advanced by them at any time for "costs" so that the Court can determine a final figure to be deducted on this account from the settlement amounts.

5. "Ampicillin"; Agricultural Claims

Mention was made at the hearing on March 24, 1970 (SM 30–34) of a drug "ampicillin" and of some civil action by the United States with respect to that

drug. Except for this mention on March 24, 1970, there is nothing in the record about any such drug. It is impossible, therefore, to say at this time what effect, if any, the consummation of the proposed compromise would have on claims of these plaintiffs, if any, on account of "ampicillin".

Attorneys representing plaintiffs in actions asserting claims on account of purchases of antibiotics for agricultural uses have addressed a request to the Court. This is that it be made clear in the order of approval that the agricultural claims are not affected by this settlement. It is impossible to say at this time what effect, if any, the consummation of the proposed compromise would have on claims on account of purchases of antibiotics for agricultural uses.

6. Determination and Direction Under Fed.R.Civ.P. 54(b)

Since the proposed compromise is being approved, the defendants are entitled to an order in each of these actions directing judgment in their favor dismissing the action as to them (except in action numbered 8 as to intervenor plaintiffs City of Santa Clara and Board of Education etc.). While such a judgment will be final as to them, the action will not be terminated because the Court must reserve jurisdiction for the purpose of distributing the settlement amounts amongst the class representatives and class members and, in this connection, deciding all issues which arise between claimants. Defendants have no concern with these matters and should not be required to involve themselves therein. It is, however, important for the administration of justice that each order approving the proposed compromise and each judgment dismissing an action as against defendants be final before any attempt is made to distribute the settlement amounts. Any appeal from the approval of the proposed compromise should be taken now.

[7] It seems, therefore, more prudent to include in each order an express determination that there is no just reason for delay and an express direction for the entry of judgment in favor of defendants dismissing the action as to them. Fed.R.Civ.P. 54(b); Republic of China v. American Express Co., 190 F.2d 334 (2d Cir. 1951), 195 F.2d 230 (2d Cir. 1952). But see Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967).

The proposed compromise is approved.

Settle order in each of these actions.

APPENDIX C

STATE OF WEST VIRGINIA,
Plaintiff-Appellee,

v.

CHAS. PFIZER & CO., Inc., et al.,
Defendants-Appellees.

ALPINE PHARMACY, INC., et al.,
Plaintiffs-Appellees,

v.

CHAS. PFIZER & CO., Inc., et al.,
Defendants-Appellees.

Cotler Drugs, Inc., et al., Plaintiffs-Appellants,

and

Louis Patlogan, formerly doing business as Patlogan's Western Pharmacy, Petitioner-Appellant.

Nos. 513–597, Dockets 35700–35784.

United States Court of Appeals,
Second Circuit.

Argued March 16, 1971.

Decided March 29, 1971.

Before MOORE and SMITH, Circuit Judges, and TIMBERS,* District Judge.

J. JOSEPH SMITH, Circuit Judge:

This is an appeal from an order of the United States District Court for the

*Chief Judge, United States District Court for the District of Connecticut, sitting by designation.

Southern District of New York, Inzer B. Wyatt, Judge, dated September 18, 1970 entering final judgment in favor of defendants-appellees and dismissing the actions as to them. The opinion is reported at 314 F.Supp. 710.

This case involves some 66 civil actions, 26 of which were commenced in the Southern District of New York and 40 of which were transferred to that district by the Judicial Panel on Multidistrict Litigation "for coordinated or consolidated pre-trial proceedings." The claim in each of these actions is that the defendants, who manufacture certain broad spectrum antibiotic drugs, are guilty of violations of the antitrust laws in the sale of these antibiotics, specifically sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). Treble damages were sought, as authorized in 15 U.S.C. § 15.

Before these actions proceeded to trial the defendants, on February 6, 1969 (as modified on May 9, 1969), proposed an offer of settlement in the amount of $100,000,000 as to the claims of the following groups:

(1) States, counties, cities and their political subdivisions and agencies and any other governmental entities (excluding the Federal Government) arising out of their direct purchases or out of payments to or for the benefit of recipients of welfare or other aid; and

(2) Wholesalers, retailers, and individual consumers arising out of their purchases, including claims of the states as *parens patriae* on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state.

The terms of this settlement offer were as follows:

(1) The appropriate actions would be determined to be maintained as class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure and the appropriate notices with option to be excluded from the class would be directed to all class members;

(2) If the exclusions were "substantial" and "material" the defendants could withdraw the offer;

(3) The $100 million settlement figure would be reduced appropriately to reflect the exclusions from class membership;

(4) Any plaintiff accepting the settlement could present to the Court a proposed plan for the allocation of the amount received within each class;

(5) If all the plaintiffs did not agree on a common plan, then the defendants could elect to proceed with any proposed plan;

(6) The plan either agreed to or selected by the defendant would be submitted to the District Court for approval pursuant to Rule 23 (e) of the Federal Rules of Civil Procedure.

(7) The administrative and other costs of the litigation would be paid from the settlement fund; and

(8) If the settlement were approved, all claims covered within its terms would be "satisfied or otherwise terminated."

On May 26, 1969, after the settlement had been accepted in principle by nearly all the plaintiffs, the district court issued an order containing the following provisions:

(1) The several states, Puerto Rico and the District of Columbia were designated as a "temporary national class" from which any of these plaintiffs not accepting the offer of settlement could by notice exclude themselves. As to those states accepting the offer of settlement, each action commenced by them was to be maintained as a class action as to two classes: (a) claims of states, counties, cities and their political subdivisions and agencies arising out of their purchases or out of payments to

or for the benefit of recipients of welfare or other aid; and (b) individual members of the consuming public who bought antibiotics in the state.

(2) City and county government entities which as plaintiff or intervenor plaintiff had pleaded by June 10, 1969 a class claim on behalf of consumers resident within their territorial limits could maintain a class action as proper representatives of the class.

(3) Actions commenced by wholesale drug stores which had accepted the offer of settlement were consolidated into the "consolidated wholesaler-retailer class" whose members were specified to be all purchasers of broad spectrum antibiotics who bought for "resale at wholesale or retail."

Having determined that certain actions were to be maintained as class actions, the district court pursuant to Rule 23(c) (3) in an order dated June 16, 1969 directed that notice be given to the various classes in the following manner.

(1) As to government entities and institutions, notice was to be by first class mail, the mailing list of class members to be supplied by the parties, usually the class representatives. This notice described the situation generally and included a copy of the settlement plan. The class members were given until August 1, 1969 to exclude themselves from the class.

(2) As to the consumer class members, notice was to be given by publication of the prescribed form on or about July 1, 1969 in every daily English and Spanish language newspaper of general circulation in each state. The consumer class members were given until August 1, 1969 to exclude themselves from the class, and they were also notified that if they wished to make a claim in the settlement they were required to file by August 16, 1969 a verified statement or a statement certified by their supplier. The notice to consumers also contained the following statement: "If you do not make an individual claim by August 16, 1969 that will constitute an authorization to the Attorney General [or other government official] to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct."

(3) As to the consolidated wholesaler-retailer class, notice was to be given by first class mail, the mailing list of class members to be supplied by Clark-O'Neill, Inc., a business engaged in maintaining a mailing list of wholesale drug houses and retail drug stores in the United States. The wholesaler-retailer class members were given until August 1, 1969 to file an individual claim or to exclude themselves from the class.

Notices of exclusion were timely filed by 61 members of the classes consisting of government entities and institutions, 42 members of the classes consisting of individual purchasers, and by about 1500 members of the class consisting of wholesalers-retailers. Claims amounting to $16,500,000 were filed by 38,000 members of the class consisting of individual purchasers, and 4100 wholesalers and retailers filed claims. The face amount of the purchases made by these claimants was in excess of $345,000,000.

Thereafter, in accordance with the terms of the settlement, several plaintiffs submitted separate plans for the allocation of the $100 million settlement fund. The most detailed and comprehensive of these, the so-called "Alabama Plan," was, with some modifications, the one accepted by the defendants and approved by the court. The theory behind this plan was that the claims of the government entities were entitled to first priority, since the dollar amount of their purchases and payments could be calcu-

lated with reasonable accuracy and the damages were direct and provable. The dollar amount of these sales and payments was determined to have been $121,620,000, and it was also calculated that the prices actually charged contained an overcharge of 66⅔%. Allowing for uncertainties in law and in fact, it was concluded that for settlement purposes an overcharge figure of 40–41% could properly be used. Applying 41% to the sales figure yielded a figure of $49,864,200 or, rounded off, $50,000,000. On the same basis it was calculated that the appropriate settlement figure for reimbursement payments to welfare recipients by the government entities was $10,000,000. This left $40 million to be divided between claims of wholesalers and retailers on the one hand and individual consumers on the other.

As to the claims of the wholesalers and retailers, many of the plaintiffs were of the view that these purchasers were not entitled to any reimbursement because the members of this class sold nearly all their antibiotics to consumers on the basis of cost plus a fixed percentage profit, which resulted in their actually making higher profits as a result of the antitrust violations. However, in order to secure the agreement of the wholesaler-retailer class to the settlement, a "nuisance value" allocation of $3 million was made to the members of this class. This is one of the disputes raised in this appeal and is dealt with below.

Finally, as to the remaining $37 million allocated for individual consumers, individual claims of $16.5 million had been filed by some 38,000 persons. After these were settled, the remaining amount would be retained by the states as indicated in the public notice to be disbursed in accordance with the direction of the district court. This is the other major issue raised in this appeal and is also discussed below.

The plan then undertook to allocate the $50 million given to governmental institutions on the basis of the number of hospital beds in the institutions of, or represented by each plaintiff as a percentage of the total number of hospital beds in the country. As to the $10 million vendor reimbursement funds, allocation was made on the basis of each state's welfare payment program. The $37 million which had been allocated to the claims of individual purchasers was divided into the amount applicable to each class of consumers represented by each government entity plaintiff on the basis of the percentage of the total population represented by the population of each government entity plaintiff.

Finally, the total amount was adjusted downward to $82,615,030 to allow for those plaintiffs who had elected to exclude themselves, except that no adjustment was made for wholesaler-retailers or for the consumer class members who had elected to be excluded.

The only serious objections to this plan were raised by some members of the wholesaler-retailer class who contended that they were entitled to the entire $37 million going to consumers. After extensive negotiations, it was agreed that defendants would deposit the settlement immediately in an escrow account, and the interest on this account, amounting to more than $8 million, would accrue to the wholesaler-retailer class. Nearly all of the committee of counsel for the wholesaler-retailers accepted this arrangement. On October 20, 1969 a plan was filed in accordance with these terms for the approval of the court and the funds were deposited in the escrow account. The escrow agreement provided (in part):

> (b) if there is a final order approving the proposed compromise by November 23, 1970, then on that date the escrow fund shall be divided into two separate such funds, one of $82,327,276 for classes represented by government entity plaintiffs and the other of the balance of the escrow fund for the wholesaler-retailer class;
>
> (c) if there is no final order by November 23, 1970, then the division into two separate funds will take

place on December 23, 1970. The effect is thus to give the wholesaler-retailer class the benefit of an additional month's interest on the entire escrow fund;

In orders dated February 4 and 6, 970 the Clerk of the Court was directed to give notice directly and by publication to all the parties in the same manner as was prescribed in the order of June 16, 969, supra, as to a hearing on the proposed settlement to be held on March 24, 970. In the meantime other minor adjustments not relevant to the issues raised on this appeal were made to the total amounts going to the various classes [see, 314 F.Supp. 732–739].

At this hearing again the only serious objections raised to the settlement plan came from some of the members of the wholesaler-retailer class to the effect that they were entitled to the entire $37 million. It should be emphasized that only a minority of this class continued to raise these objections. On June 24, 1970 Judge Wyatt filed a lengthy opinion and order approving the settlement and dismissing the actions against defendants. This appeal followed by the minority members of the wholesaler-retailer class.

The first question to be considered is what is the proper scope of review for this court to apply. Judge Wyatt viewed his responsibilities in evaluating the settlement as follows:

> Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.
>
> The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation • • • and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise". The Supreme Court then emphasizes: "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." The quotations are from Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424–425, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) [314 F.Supp. at 740–741].

[1] It appears to be well settled that in reviewing the appropriateness of the settlement approval, the appellate court should only intervene upon a clear showing that the trial court was guilty of an abuse of discretion.[1] As Judge Brown in the Fifth Circuit recently noted in Florida Trailer and Equipment Co. v. Deal, 284 F.2d 667, 671 (1960):

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant estab-

Gas, Ry. and Lighting Co. v. New York, N. H. & H. R. R., 190 F.2d 308, 308 (2d Cir. 1951); In re Prudence Co., Inc., 98 F.2d 959 (2d Cir. 1938). (See, 3B Moore 23.80[4]; Norman v. McKee, 290 F.Supp. 20 (N.D.Cal.1968).)

lishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and thus no basis for a compromise.

[2] It is important to take particular note of the fact that in reviewing the compromise, this court need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues which the case raises, yet at the same time we are apparently required to attempt to arrive at some evaluation of the points of law on which the settlement is based. A number of years ago this court set forth the applicable standard in In Re Prudence (supra n. 1):

> The district court did not determine the validity of the government's claim with respect to the taxability of the "commissions"; nor need this court do so. The very purpose of a compromise is to avoid the determination of sharply contested and dubious issues, as this court pointed out in the case of In re Riggi Bros. Co., 2 Cir., 42 F.2d 174, 176. Hence, to succeed upon this appeal the appellant must show, assuming there are no issues of fact in dispute, that the rules of law for which she is contending are so clearly correct that it was an abuse of discretion for the district court to approve the settlement [98 F.2d at 860].

The most interesting and difficult issue which this appeal presents is the use of the "passing-on" doctrine as regards the claims of the wholesalers and retailers, not as a defense to escape liability, as is normally the case, but rather as a basis for determining the distribution of the damages recovered among various plaintiffs. Judge Wyatt had the following comments on this question:

> Without attempting to decide the matter, it appears at first glance to be highly doubtful whether wholesalers or retailers suffered any damage whatever. Defendants sold only in dosage form; this means that the wholesaler then sold in the original packages (at a mark-up of 16⅔% or more over cost) and that—if the retail druggist did not always sell in the original packages but repackaged in varying quantities—at least the retail druggist sold the dosage form just as received from a wholesaler or from a defendant and without any addition, subtraction or combination. To the consumer, antibiotics are sold only by prescription. In some instances the retail druggist may charge his cost, plus a flat professional fee. According to affidavits of experts in the field, however, the overwhelming majority of drug stores in the period 1953-66 charged for prescription drugs a uniform mark-up of 66⅔% over cost. If so, this would mean that any overcharge by defendants in violation of the antitrust laws was passed on to the end use purchaser. The result is that wholesalers and retailers, far from sustaining damages, made substantial profits from any antitrust violations [314 F.Supp. at 745].

Although appellants dispute the factual accuracy of the court's finding that they suffered no economic loss, they also contend that even accepting this premise, they are still entitled to recovery under Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In that case United had charged Hanover more for shoe machinery equipment than would have been charged but for the violation of the antitrust laws. The cost of the machinery was one of several factors which went into the price at which Hanover sold its products to the consumer. In these circumstances, the Court relying on its prior decisions in Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906); Thomsen v. Cayser, 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597 (1917); Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451 (1918); and Adams v. Mills, 286 U.S. 397, 52 S.Ct. 589, 76 L.

fd. 1184 (1932) held that the passing-on *defense* was not available to United. Mr. Justice White noted:

> We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. • • • Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.
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> • • • • • •
>
> Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense. We recognize that there might be situations—for example, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. 392 U.S. at 492–494, 88 S.Ct. at 2231–2232.

In considering the question of whether the obvious reluctance of the Court to allow the passing-on doctrine to be used as a defense to treble-damage liability should dictate the result in the context of the present case, the most important thing to keep in mind is the result orientation with which the Court has approached the whole area of private treble-damage litigation. A good example of this is contained in Minnesota Mining and Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 85 S. Ct. 1473, 14 L.Ed.2d 405 (1965). There the question was whether the statute of limitations was tolled under section 5(b) of the Clayton Act by an FTC proceeding, as distinguished from an antitrust proceeding instituted by the Department of Justice. In spite of Mr. Justice Black's persuasive dissent on the legislative history of the statutes, the Court held the statute was tolled, while obliquely admitting that the result was difficult and perhaps impossible to justify in terms of conventional analysis of the text and legislative history, precisely because a "contrary conclusion" would "deprive large numbers of private litigants" of assistance in their treble damage litigation [381 U.S. at 322, 85 S. Ct. at 1479]. In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), the Court noted that it has granted certiorari "because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States" [392 U.S. at 136, 88 S.Ct. at 1983]. The Court in *Perma Life* then went on to substantially narrow the *pari delicto* doctrine as a defense noting:

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of

competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. 392 U.S. at 139, 88 S.Ct. at 1984.

In *Hanover Shoe* itself Justice White placed strong emphasis on the Court's desire to encourage private treble damage actions.

> These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness [392 U.S. at 494, 88 S.Ct. at 2232].

Keeping these comments in mind, there are then several obvious distinctions between the principles laid down in *Hanover Shoe* and the present case. First, the passing-on doctrine is not here being used as a defense to permit the defendants to escape liability, but rather as an attempt to award damages, insofar as is possible, to those who ultimately paid higher prices as a result of the collusive pricing, and to avoid giving a windfall gain to those who rather clearly were not injured. Secondly, to permit the use of the doctrine in the present circumstances will not act to limit or frustrate private treble-damage claims, but will, if anything, do the opposite. As Judge Feinberg noted in discussing this problem in Atlantic City Electric Co. v. General Electric Co., 226 F.Supp. 59, 70 (S.D.N.Y. 1964):

> Were the consumers a proper party in these proceedings, it might be urged by defendants that the Court should equitably distribute the damages between the utilities and the consumers, cf. Interstate Natural Gas Co., *supra*, but when the only parties to the suit are the equipment manufacturers and the immediate purchaser-utilities, the manufacturers should not be able to prevent the utilities from recovering from them the amount of the overcharges because the utilities have passed them on to the ultimate consumers in the form of higher rates.

[3] Finally, the *Hanover Shoe* Court itself indicated, as quoted above, that it might well be willing to recognize, in the limited situation where the initial purchaser of the collusively priced goods resold them on a "cost-plus" basis "thus making it easy to prove that he has not been damaged * * * [that] the considerations requiring that the passing-on defense not be permitted in this case would not be present" [392 U.S. at 494, 88 S.Ct. at 2232]. The record below makes it clear that the arrangements under which the wholesalers and retailers resold these products were, in virtually all cases, cost plus a set percentage mark-up (for wholesalers 16⅔% for retailers 66⅔%). Judge Wyatt therefore concluded:

> Here the antibiotics in dosage form (capsules, tablets, or other forms) were resold just as obtained from defendants. Nothing was added or changed. The mark-up was applied to the cost and the resultant price was collected from the consumer. The higher the cost, the higher the mark-up, and the higher the profit to the members of this [wholesaler-retailer] class. The situation here seems most like the " 'cost-plus' contract" referred to in the *Hanover* opinion * * * [314 F.Supp. at 746].

In regard to this point, therefore, we conclude that the district court was well within its discretion.[2]

2. See the "oil jobber" cases—Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580 (8 Cir.), cert. denied, 326 U.S. 734, 66 S.Ct. 42, 90 L.Ed. 427 (1945); Northwestern Oil Co. v. Socony Vacuum Oil Co., 138 F.2d 967 (7 Cir. 1943), cert. denied, 321 U.S. 792, 64 S.Ct. 790, 88 L.Ed. 1081 (1945); Twin Ports Oil Co. v. Pure Oil

[4] The second major contention of the appellants concerns the propriety of permitting the states to recover through their attorneys general damages on behalf of individual consumers who have not themselves filed any claims. Initially the recovery by the state on behalf of consumers was based on two alternative theories, that of the state acting as *parens patriae*, and secondly, that of a standard Rule 23 class action. *Parens patriae*, literally "parent of the country," refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown. Recently the doctrine has been used to allow the state to recover damages to quasi-sovereign interests wholly apart from recoverable injuries to individuals residing within the state. These quasi-sovereign interests have included the "health, comfort, and welfare" of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state. [See Simburg, "State Protection of Economy and Environment," 6 Colum.J. of Law and Soc.Prob. 411 (1970).]

The use of the *parens patriae* theory has not, however, met with much success in the few attempts to apply it to the recovery of treble-damage antitrust claims, most notably in the recent ruling of the Ninth Circuit in State of Hawaii v. Standard Oil Co., 431 F.2d 1282 (1970), reversing the District Court for Hawaii which had allowed a private antitrust action to be brought by the state under this theory, although the Supreme Court has recently granted certiorari in this case, 401 U.S. 931, 91 S.Ct. 931, 28 L.Ed. 2d 215 (1971).[3] While in our view the court below might well have considered making use of a *parens patriae* theory in the present case (see, "State Protection of Its Economy and Environment" (*supra*)), Judge Wyatt made it quite clear, in spite of the assertions of appellants here, that he was proceeding solely on the basis of a Rule 23 class action, and therefore evaluation of the *parens patriae* doctrine by this court is unnecessary.

We then turn to the question of the propriety of permitting the maintenance of a class action under Rule 23. To be maintainable as a class action, a suit must meet all the requirements set forth in Rule 23(a) and also fall within one of the subsections of 23(b), in this case 23(b) (3).[4]

Co., 119 F.2d 747 (8 Cir.), cert. denied, 314 U.S. 644, 62 S.Ct. 84, 86 L.Ed. 516, rehearing denied, 314 U.S. 711, 62 S.Ct. 176, 86 L.Ed. 567 (1947); Leonard v. Socony Vacuum Oil Co., 42 F.Supp. 369 (W.D.Wisc.1942), appeal dismissed, 130 F.2d 535 (7 Cir. 1942).

3. See also, Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 309 F.Supp. 1057 (E.D.Pa. 1968); Pfizer and Co., Inc. v. Clark County Hospital Ass'n, 69 Civ. 768 (S.D. N.Y.1970); North Carolina v. Chas. Pfizer and Co., 69 Civ. 839 (S.D.N.Y.1970).

4. Rule 23(a). *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Section 23(b). *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

In Eisen v. Carlisle and Jacquelin, 391 F.2d 555 (2d Cir. 1968) this court had before it the question of whether a class action was proper by a single "odd-lot" purchaser of securities on behalf of himself and an estimated 3,750,000 other odd-lot traders in an action alleging violations of the Sherman Act. Judge Medina in a lengthy opinion held that a class action under these circumstances was maintainable under the provisions of revised Rule 23(b) (3), and the holding in *Eisen* would appear largely controlling in the present case. Rather clearly the requirements of Rule 23(a) have been met in that joinder of all the members would be impossible, questions of law and fact as well as claims and defenses are typical of all the members, and the representation by the state adequately protects the class members' interests.

[5] Obviously the only practical way that individual consumers could recover in the circumstances of this case is through the device of class representation, and, as Judge Medina noted, "the class suit [is designed to] provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." [391 F.2d at 560.] In addition, as Judge Medina pointed out, under both the old and new versions of Rule 23, antitrust violations involving large numbers of individuals have been held to merit treatment as class actions.[5]

The appellants also attack the adequacy of the notice given to consumers pursuant to Rule 23(c) (2). This section calls for "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." As noted above, notice to consumers was published in quarter-page, prominently headlined ads in every daily newspaper in the participating states. There are no precise rules as to what constitutes adequate notice, and the due process standards have been held to vary depending on the circumstances of each case. In the present action notice by publication was obviously the only practical alternative. The Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317, 70 S.Ct. 652, 658, 94 L.Ed. 865 (1949) noted: "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning." Judge Weinstein in Dolgow v. Anderson, 43 F.R.D. 472, 497, 498 (E.D.N.Y.1968) commented on the particular notice problem involved here.

> In determining what constitutes "the best notice practicable under the circumstances," it is necessary to remember that the recent amendments were specifically designed to broaden the usefulness of the class action device. * * * By overemphasizing the notice requirement that purpose may be defeated. * * * To require the [4] present plaintiffs to provide immediate actual notice to each member of the classes involved [over 200,000] would, for all practical purposes spell the immediate end to this litigation.

[6] It should also be noted that the Judicial Panel on Multi-District Litigation has used Judge Wyatt's notice in the present case as the model for federal trial courts. Manual for Complex and Multidistrict Litigation, 1 Pt., 2 Moore, App. 1.65 (1970). If this type of litigation is to be entertained at all, therefore, the methods of notice used by the dis-

5. Kainz v. Anheuser-Busch Inc., 194 F.2d 737 (7 Cir.), cert. denied, 344 U.S. 820, 73 S.Ct. 17, 97 L.Ed. 638 (1952); City of Philadelphia v. Morton Salt Co., 248 F.Supp. 506 (E.D.Pa.1965); Siegel v. Chicken Delight, Inc., 271 F.Supp. 722 (N.D.Cal.1967); Philadelphia Electric Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D.Pa.1968); cf. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Hohmann v. Packard Instrument Co., 399 F.2d 711 (7 Cir. 1968). See, Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)," 81 Harv.L.Rev. 356 (1967).

trict court here would appear adequate to meet the due process problem.

There is one aspect of the manner in which the consumer class recovery was handled that does present some difficulty, although not mentioned by appellants, and that is allowing the states to recover on behalf of this class without requiring any affirmative indication from individual members that they wished to assign their claims in this manner. There are some cases where the courts have required class members to give notice that they wish to participate.[6]

[7] We conclude, however, that the use of what might be termed the "Book-of-the-Month-Club" procedure in these circumstances should be permitted. The notice stated that those not filing individual claims by a certain date would be assumed to be authorizing the state through its Attorney General to recover on their behalf. Presumably there were among this group some who read the notice and made an affirmative decision to assign their claims. Undoubtedly there were also those who did not receive notice, and it is with this group we should be concerned. Since under the revised rule those in a (b) (3) class who do not elect to opt out will be bound by the judgment, it is difficult to see how those who do not receive notice but on whose behalf damages are awarded to the state are in any way harmed by permitting the use of this procedure. To require those who wish to authorize the state to recover for them to affirmatively notify the court to this effect would obviously, as a practical matter, be likely to reduce the amount of these recoveries to a minimum.

[8] The other points raised by appellants appear to be clearly without merit and can be dealt with summarily. Appellants make several rather vague charges of conflict-of-interest as to various counsel for both the wholesaler-retailer class and the government plaintiffs. The district court specifically found that "from the affidavits submitted and [from] the Court's knowledge of the progress of these actions, it is clear that the proposed compromise was the result of good faith bargaining at arms' length." The appellants have suggested nothing of substance which would cast doubt on this conclusion.

Appellants also attack the wholesaler-retailer notice of February 16, 1970 concerning the settlement conference and hearings for failure to mention the plan of allocation submitted by the Committee of Counsel for the wholesaler-retailer class. This is erroneous since the notice clearly referred to the plan and invited any interested party to inspect it at the clerk's office.

[9] Appellants also complain that the wholesaler-retailer notices (of June, 1969 and February, 1970) were mailed only to wholesalers and retailers in business as of June, 1969, and therefore failed to notify druggists who went out of business prior to that time. This contention is without merit since the second notice went beyond the Clark-O'Neill trade list to include anyone whose name was available. In addition, it appears that at a later stage in these proceedings when the district court administers the intra-class distributions, individual claims will again be considered.

[10, 11] Some of the appellees have suggested that the taking of this appeal was solely to obtain for the appellants the extra month's interest (some $640,000) as provided in the escrow agreement. There is a letter dated December 18, 1969 from counsel for the minority group of wholesaler-retailers, Edward A. Berman, which suggests that this may be the case. In that letter Mr. Berman states: "Also, our group is convinced that the defendant's modified plan as accepted by most of the committee members invites and demands an appeal from the allocation order because, in our opin-

6. Philadelphia Electric Co. v. Anaconda Am. Brass Co. (supra, 43 F.R.D. at 459); Harris v. Jones, 41 F.R.D. 70, 71, 74–75 (D.Utah, 1966); Iowa v. Union Asphalt and Roadoils, Inc., 281 F.Supp. 391, 404 (S.D.Iowa, 1968); but see, Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622, 625 (S.D.N.Y.1968).

ion, an appeal is the only way that the final order can be delayed beyond the thirteenth month." Under the escrow agreement, this extra month's interest, which, of course, is not an insubstantial amount in this case, would otherwise have accrued to the government entity plaintiffs and the classes they represent. Sections 1912 and 1927 Title 28 of the United States Code and Rule 38 of the Federal Rules of Appellate Procedure provide that the court may award damages and double costs to the appellee in cases of frivolous and vexatious appeals. The imposition of such sanctions, however, is highly unusual and requires a clear showing of bad faith on the part of appellants. We are unable to find sufficient evidence in the record to warrant such action.

Finally we wish to commend Judge Wyatt for the skill and diligence which he has demonstrated in conducting this difficult and complex litigation.

Affirmed.

APPENDIX D

In re Coordinated Pretrial Proceedings in ANTIBIOTIC ANTITRUST ACTIONS.

Richard X. Connors, et al., v. Chas. Pfizer & Co., Inc., et al., (E.D. Virginia, Civil Action No. 70-70-A).

M 19-93A and 70 Civ. 1075.

United States District Court, S. D. New York.

March 30, 1971.

MISCELLANEOUS ORDER NO. 71-8

MEMORANDUM AND ORDER

MILES W. LORD, District Judge (By Assignment).

This action is one of more than 150 related treble damage antitrust actions transferred to the Southern District of New York under 28 U.S.C. § 1407.[1] All were originally assigned to the Honorable Inzer B. Wyatt of the Southern Dis-

[1] New York. See, for example, 303 F.Supp. 1056 (Jud.Pan.Mult.Lit.1969). This action was transferred to New York without objection on March 18, 1970.

trict of New York for coordinated or consolidated pretrial proceedings.

On February 6, 1969, the defendants made a written offer of a hundred million dollars in settlement of all of the claims of states, counties, cities and their political subdivisions, and the claims of wholesalers, retailers and individual consumers of the broad spectrum antibiotic drugs involved in the alleged conspiracy. State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710, 722 (S.D.N.Y.1970).[2] On December 2, 1970, the Judicial Panel on Multidistrict Litigation reassigned all of the "non-settling cases" including the above case to the undersigned judge sitting by designation in the Southern District of New York. In re Antibiotic Drug Litigation, 320 F. Supp. 586 (Jud.Pan.Mult.Lit.1970).

On September 29, 1970, Judge Wyatt dismissed the settling state actions, including a class action brought by the Commonwealth of Virginia. (Hereinafter referred to as the "Virginia Class Action.") The defendants have filed a motion to dismiss this action on the ground that the claims of all six plaintiffs are barred by the judgment in the Virginia Class Action. Extensive briefs were filed and this matter was argued in San Francisco on March 23, 1971.

A further chronology of events is essential to the court's decision in this matter. On July 1, 1969, a notice of the establishment of the individual state consumer class actions was given as required by Rule 23(c) (2), F.R.Civ.P. The notice relating to the Virginia Class Action was published in 28 daily Virginia newspapers and in three Washington, D.C. newspapers of general circulation. The class included all persons who purchased these drugs in the state during the relevant period. The consumer class members were given until August 1, 1969, to exclude themselves from the class and they were notified that if they intended to make a claim against the settlement fund, they had to file a verified statement of purchase by August 16, 1969. The notice also contained the following provision:

> If you do not make an individual claim by August 16, 1969, that will constitute an authorization to the Attorney General * * * to utilize whatever money he may recover as your representative for the benefit of the citizens of your State in such manner as the Court may direct. State of West Virginia v. Chas. Pfizer & Co., Inc., et al., 314 F.Supp. 710, 725.

On February 24, 1970, a notice of the proposed compromise and settlement, as required by Rule 23(e), was published in the same newspapers. This notice provided that a hearing would be held on March 24, 1970 to determine whether the settlement should be approved.

This action was commenced on February 17, 1970, by six residents of Fairfax County, Virginia.[3] None of the six "opted out" of the Virginia Class Action or filed a statement of claim. They contend that they are not bound by the judgment in the Virginia Class Action on the ground that the manner by which the settlement offer was made, accepted and approved violated the constitutionally-protected rights of the absent class member. They specifically contend that the (c) (2) notice and the (e) notice were both defective; that the class representative—the Attorney General of the Commonwealth of Virginia—had an interest antagonistic to them and other members of the class; and that a disproportionate share of the settlement was distributed to the states and their political subdivisions to the detriment of the *consumers* within the state.

Plaintiffs rely heavily on the decision in Hansberry v. Lee, 311 U.S. 32, 61 S.

2. A second settlement offer covered the claims of private hospitals and Blue Cross-Blue Shield Insurance Plans.

3. At least two of the plaintiffs no longer reside in Virginia but it is not suggested that their subsequent relocation to Massachusetts has removed them from the Virginia class.

Ct. 115, 85 L.Ed. 22 (1940), which held that in circumstances of that case, the absent members of the class would not be bound by a judgment rendered in an action in which their rights were not adequately protected. But the Court went on to emphasize that it was

> • • • familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or *where they actually participate in the conduct of the litigation* in which members of the class are present as parties, • • • or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. 311 U.S. at 43–44, 61 S.Ct. at 118 [Emphasis added]

The indisputable fact is that these six plaintiffs were fully and fairly represented by their attorney, Mr. Paul Scanlon, at the hearing held in New York on March 25, 1970, to determine whether or not the proposed settlement should be approved.[4]

When Judge Wyatt finally approved the settlement, Mr. Scanlon filed a notice of appeal but later decided that an appeal was not the proper procedure to attack the validity of the settlement and chose, instead, to press the matter *collaterally* through this action.[5] *Hansberry* compels the dismissal of this action. Since these plaintiffs, through their counsel, actually participated in the hearing before Judge Wyatt, they are bound by the judgment in the Virginia Class Action, subject of course, to attack by direct appeal to the appropriate court.

It is therefore ordered that the defendants' motion to dismiss is hereby granted and this cause is dismissed with prejudice.

4. Counsel made it clear that he was appearing on behalf of the six plaintiffs in this case.

"MR. SCANLON: Your Honor, I am here today representing six individuals who are residents of the State of Virginia—

THE COURT: Are you in the action which was brought in Virginia and which has recently been transferred here?

MR. SCANLON: That is correct, your Honor. The six plaintiffs who are in that suit neither excluded themselves from the Attorney General's class nor did they file a claim, nor did they intervene pursuant to the notice published July 1. Therefore, your Honor, at this moment *they are within the confines of the class represented by the Attorney General of the Commonwealth.*

• • • • •

We are here today, your Honor, pursuant to a notice authorized under Rule 23(e), and this hearing is governed by Section 23(c) of the Federal Rules of Civil Procedure." Transcript of the hearing before Judge Wyatt on March 25, 1970, pp. 244–245 [Emphasis added]. The transcript of Mr. Scanlon's remarks consume fifty pages of the transcript of that hearing.

5. Following the entry of judgment in the settling cases, notices of appeal were filed by several parties including some representing absent class members. This appeal was expedited and was also heard on March 23, 1971. Many of the issues raised by counsel in his brief before this court are also being presented to the Court of Appeals.

APPENDIX E

Richard X. CONNORS et al., Plaintiffs-Appellants,

v.

CHAS. PFIZER & CO., Inc., et al., Defendants-Appellees.

No. 319, Docket 71-1593.

United States Court of Appeals, Second Circuit.

Argued Oct. 22, 1971.

Decided Nov. 12, 1971.

Appeal from the United States District Court for the Southern District of New York, Miles W. Lord, Judge.*

Richard X. Connors and five other residents of Fairfax County, Virginia, members of the statewide consumer class dealt with in West Virginia v. Chas. Pfizer & Co., Inc., 314 F.Supp. 710 (S.D. N.Y.1970), affirmed 440 F.2d 1079 (2d Cir. 1971), cert. denied Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. —, 92 S.Ct. 81, 30 L.Ed.2d — (1971), appeal from a judgment dismissing their complaint on the ground that their claims were barred by the judgment in the former action.

Paul D. Scanlon, Alexandria, Va., for plaintiffs-appellants.

John E. F. Wood, New York City (Dewey, Ballantine, Bushby, Palmer & Wood, New York City, on the brief), for defendant-appellee Chas. Pfizer & Co., Inc.

Winthrop, Stimson, Putnam & Roberts, New York City, on the brief, for defendant-appellee Bristol-Myers Co.

Donovan, Leisure, Newton & Irvine, New York City, on the brief, for defendant-appellee American Cyanamid Co.

Cravath, Swaine & Moore, New York City, on the brief, for defendants-appellees Squibb Beech-Nut, Inc. and Olin Corporation.

Covington & Burling, Washington, D. C., on the brief, for defendant-appellee The Upjohn Co.

Before MEDINA, FEINBERG and MULLIGAN, Circuit Judges.

PER CURIAM:

We affirm on Judge Lord's opinion below, reported at 333 F.Supp. 296 (S.D. N.Y.1971).

* United States District Judge for the District of Minnesota, sitting by designation.

APPENDIX F

UNITED STATES CONSTITUTION

Amendment V

AMENDMENT V–CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CLAYTON ACT

Clayton Act, Section 4, 15 U.S.C. §15:

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731.

Clayton Act, Section 16, 15 U.S.C. §26:

§26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the

parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, §16, 38 Stat. 737.

STATUTES INVOLVED

SHERMAN ANTITRUST ACT

Section 1, 15 U.S.C. § 1:

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description

are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Section 2, 15 U.S.C. § 2:

§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions.

(a) *Prerequisites To Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the classs would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest

of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination By Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

[Received JAN 10 1972]

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 5th day of January, one thousand nine hundred and seventy-two.

Richard X. Connors, Elizabeth B. Connors, Douglas H. Riley, Carol E. Riley, Joseph E. Ramey and Ethel C. Ramey,

Plaintiff-Appellants,

v.

Chas. Pfizer and Co., Inc., et. al.,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated December 14, 1971, for leave to file a petition for rehearing be and it is hereby granted.

It is further ordered that, after due consideration, the petition for rehearing is denied.

Harold R. Medina

Wilfred Feinberg

William H. Mulligan

Circuit Judges.